95-1448

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MARIO LUDMER,

Respondent,

vs.

MAURICE A. NERNBERG, JR.,

Petitioner.

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

Maurice A. Nernberg
MAURICE A. NERNBERG & ASSOCIATES
301 Smithfield Street
Pittsburgh, PA 15222
(412) 232-0334
Counsel of Record for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Did the retroactive application of the Wrongful Use of Civil Proceedings Act, which resulted in the imposition of punitive damages against Petitioner for conduct which was not actionable at the time he acted, constitute an improper ex post facto law?

2. Did the retroactive application of the Wrongful Use of Civil Proceedings Act, which resulted in the imposition of punitive damages against Petitioner for conduct which was not actionable at the time he acted, violate the Petitioner's right to due process of law?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are listed in the caption of the within Petition for Writ of Certiorari.

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The Memorandum Opinion of the Superior Court of Pennsylvania, entered on February 26, 1986 at No. 1275 Pittsburgh, 1984 has not been reported but appears in the Appendix at page 42a.

The Opinion of the Honorable Stephen A. Zappala of the Supreme Court of Pennsylvania entered on February 3, 1989 at No. 46 W.D. Appeal Docket 1987 has been reported at 520 Pa. 218, 553 A.2d 924 (1989), and is also included in the Appendix at page 26a.

The Opinion of the Honorable Gerard M. Bigley of the Court of Common Pleas of Allegheny County, entered on August 23, 1993 at GD84-11881 has not been reported but appears in the Appendix at page 19a.

The Opinion of the Honorable Justin M. Johnson of the Superior Court of Pennsylvania entered on April 21, 1994 at No. 947 Pittsburgh 1993 has been reported at 433 Pa. Super. 316, 640 A.2d 939 (1994), Allocatur denied, 664 A.2d 542 (1995), _____ Pa. _____ (1995), and also appears in the record at page 2a.

STATEMENT OF JURISDICTION

Petitioner seeks review of the Orders of the Supreme Court of Pennsylvania entered on July 21, 1995, denying the Petitioner's Petition for Allowance of Appeal, and October 24, 1995, denying the Petitioner's Petition for Reconsideration of Denial of Petition for Allowance of Appeal.

This Honorable Court has jurisdiction to review such Orders by Writ of Certiorari pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Resolution of the within matter involves the following constitutional provisions:

1. Article 1, Section 9, Clause 3, which provides that:

> No Bill of attainder or ex post facto law shall be passed.

2. Section 1 of the Fourteenth Amendment, which provides in relevant part that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

THE UNDERLYING ACTION:

The Petitioner, Maurice A. Nernberg, Jr. (NERNBERG), is an attorney who is licensed to practice law in the Commonwealth of Pennsylvania. In 1977, Margaret O'Toole (Mrs. O'Toole) retained NERNBERG to represent her in a personal injury case which was already pending in the Court of Common Pleas of Allegheny County. The Respondent, Mario Ludmer (LUDMER), was Mrs. O'Toole's treating physician.

After taking the case, NERNBERG met with LUDMER and Mrs. O'Toole, for the purpose of obtaining an expert medical report. Although LUDMER had provided a "form" report to Mrs. O'Toole's prior attorney, both Mrs. O'Toole and NERNBERG felt that the form report was incomplete and inconsistent with Mrs. O'Toole's actual medical history. During the meeting, LUDMER agreed to provide a complete medical report, in narrative form, which more completely described Mrs. O'Toole's history and prognosis.

Following the meeting, LUDMER billed NERNBERG for the report, and NERNBERG paid LUDMER's bill. However, LUDMER never provided the promised report, despite several requests by NERNBERG.

Shortly before Mrs. O'Toole's trial, LUDMER's attorney, Seymour A. Sikov, Esquire (SIKOV), advised NERNBERG that LUDMER would refuse to provide expert testimony for Mrs. O'Toole. When the case came to trial, both the trial judge and the defense attorney were aware of

LUDMER's refusal to testify for Mrs O'Toole. The case ultimately settled for $8,000.00, although both NERNBERG and Mrs. O'Toole anticipated a recovery in excess of $20,000.00.

On March 5, 1979, NERNBERG initiated the "underlying action" against LUDMER by filing a Praecipe for Writ of Summons. NERNBERG also filed a Motion for Pre-Complaint Discovery, which was argued before the Honorable R. Stanton Wettick, Jr. Judge Wettick granted the Motion, despite Ludmer's opposition, and the depositions of LUDMER, NERNBERG and Mrs. O'Toole were taken. NERNBERG then filed a Complaint against LUDMER, which asserted that:

A. LUDMER had breached his contract with NERNBERG by his failure to provide an expert report and to testify as an expert;

B. LUDMER had interfered with NERNBERG's contingent fee arrangement with Mrs. O'Toole, by "depriving the parties of the means of performance"; and

C. Due to LUDMER's conduct, NERNBERG had been damaged, since the settlement value of the case was greatly reduced by LUDMER's refusal to render a report and to testify.

LUDMER filed preliminary objections, including a demurrer to the Complaint, which were argued before the Honorable Stephen A. Zappala. By his Order dated September 3, 1980, Judge Zappala denied LUDMER's Preliminary Objections, and ordered LUDMER to file an Answer to NERNBERG's Complaint.

After the pleadings were closed, LUDMER filed a Motion for Summary Judgment, which Motion relied upon the same grounds previously raised in LUDMER's Preliminary Objections. The Motion for Summary Judgment was argued before the Honorable Richard G. Zeleznik and the Honorable Raymond L. Scheib. By Order dated April 20, 1981, Judges Zeleznik and Scheib granted LUDMER's Motion for Summary Judgment.

NERNBERG filed an appeal to the Superior Court of Pennsylvania docketed at No. 632 PGH 1981. By Order dated May 6, 1983, the Superior Court affirmed the entry of summary judgment in favor of LUDMER. In its Memorandum Opinion, the Superior Court agreed with NERNBERG that there were outstanding issues of disputed fact which could not be resolved by summary judgment. However, the Court held that since NERNBERG was Mrs. O'Toole's attorney, he lacked standing to bring suit against LUDMER as her treating physician. Significantly, the Court made no finding that the appeal was frivolous, or that NERNBERG lacked probable cause or a proper purpose in filing the suit.

NERNBERG filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, which was docketed at No. 150 W.D. Allocatur Docket 1983. By Order

dated September 14, 1983, the Supreme Court denied the Petition for Allowance of Appeal.

PASSAGE OF THE WRONGFUL USE OF CIVIL PROCEEDINGS ACT:

At the time that NERNBERG initiated the "underlying action" against LUDMER, Pennsylvania law was clear that a person could not be held liable for the wrongful use of civil process unless the "underlying action" resulted in an arrest of the person or seizure of property. See, Dietrich Industries, Inc. v. Abrams, 309 Pa. Super. 202, 455 A.2d 119 (1982) and cases cited therein.

However, on December 19, 1980, the Pennsylvania Legislature enacted Public Law 1296, No. 232, otherwise known as the Wrongful Use of Civil Proceedings Act. As set forth in the Statute, the effective date of the Act was February 17, 1981, (see, 42 Pa.C.S. § 8351), almost two (2) years after NERNBERG had filed the underlying action against LUDMER.

Significantly, the "arrest or seizure of the person or property of the plaintiff" was eliminated as a "necessary element" for a cause of action for wrongful use of civil proceedings. See, 42 Pa.C.S. § 8351(b). Moreover, the Act added punitive damages as an element of damages for wrongful use of civil proceedings (see 42 Pa. C.S. § 8353(6), although prior Pennsylvania law required independent proof of outrageous and malicious conduct. See, Feld v. Merriam, 506 Pa. 383, 485 A.2d 742 (1984) and cases cited therein.

THE INSTANT CASE:

LUDMER initiated the instant case against NERNBERG on July 9, 1984. In his complaint, LUDMER asserted that NERNBERG's filing of the "underlying action" in 1979 constituted a Wrongful Use of Civil Proceedings under the new Act.

NERNBERG filed Preliminary Objections which were argued before the Honorable Bernard J. McGowan. By Opinion and Order dated January 11, 1985, Judge McGowan dismissed LUDMER's Complaint, holding that since LUDMER's claims were based upon NERNBERG's conduct which took place prior to the effective date of the Act, LUDMER had failed to state a cause of action against NERNBERG (see Appendix, p. 2a).

LUDMER filed an Appeal to the Superior Court of Pennsylvania. By Memorandum Opinion and Order dated February 26, 1986, a panel of the Superior Court reversed the decision of the trial court, and remanded the case for a trial.

NERNBERG filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. In a decision which has been reported at 520 Pa. 218, 553 A.2d 924 (1989), the Supreme Court of Pennsylvania affirmed the decision of the Superior Court to remand the case for a trial.

Upon remand, the case proceeded to trial before the Honorable Gerard M. Bigley. As indicated by the record, LUDMER's claims were focused almost exclusively on NERNBERG's alleged conduct which occurred prior to the effective date of the Wrongful Use Act. In addition, the jury was instructed that it could impose punitive damages against NERNBERG under the Act for his pre-Act conduct. The jury

was not instructed that proof of malicious conduct was necessary to impose punitive damages and in fact, was permitted to infer that NERNBERG acted for an improper purpose solely because he lost the underlying case. The jury ultimately returned a verdict in favor of LUDMER and against NERNBERG, which verdict included punitive damages in the amount of $50,000.00.

NERNBERG filed an appeal to the Superior Court of Pennsylvania. In a published opinion reported at 433 Pa. Super. 316, 640 A.2d 939 (1994), a panel of the Superior Court affirmed the judgment of the trial court.

NERNBERG filed a Petition of Allowance of Appeal to the Supreme Court of Pennsylvania, which was denied by Order dated July 21, 1995 (Appendix, p. 1a). NERNBERG filed a timely Petition for Reconsideration, which was denied by the Supreme Court of Pennsylvania on October 24, 1995 (Appendix, p. 56a).

In connection with the above appeals, NERNBERG arranged for an appropriate supersedeas bond to be filed with the Court pursuant to the provisions of Pa.R.A.P. 1731 et seq. Under the provisions of Pa.R.A.P. 1734, the bond was to act as a supersedeas until the final disposition of all appeals. In addition, under Pa. R.A.P. 3812, the Prothonotary of the Supreme Court of Pennsylvania was required to retain the record until the disposition of all appeals.

On October 31, 1995, LUDMER presented

an ex parte Order of Court to Judge Bigley (the trial judge) , requesting that the surety on the bond be found liable, and requesting payment within three (3) days, upon penalty of the payment of interest, punitive damages and attorneys' fees. Although neither NERNBERG nor the surety received any notice of the proposed Order or its presentation, Judge Bigley granted the order as requested by Ludmer (Appendix, p. 64a).

NERNBERG notified the Supreme Court of Pennsylvania of his intention to seek a Writ of Certiorari from this Honorable Court (Appendix, p. 61a), and filed an Emergency Application for Special Relief, requesting, among other things, that the case be stayed pursuant to the supersedeas bond (previously filed) and the disposition of the within Petition (Appendix, pp. 58 - 74a). By Orders dated December 1, 1995 and December 4, 1995, the Supreme Court of Pennsylvania denied NERNBERG's Application and directed that the case be remanded to the trial court for the imposition of counsel fees against NERNBERG (Appendix, p. 74a). NERNBERG received no hearing before the counsel fees were imposed, and in effect, has now been punished for attempting to exercise his right to review of this case by this Honorable Court.[1]

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[1] LUDMER may assert that this issue is now "moot" in that the supersedeas bond has already been released and payment has

NERNBERG now seeks a Writ of Certiorari from this Honorable Court.

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been made. However, as indicated by the Application for Emergency Relief, such payment was made under compulsion due to the severe penalties as mandated by Judge Bigley's Order (Appendix, pp. 109 - 113a). Moreover, NERNBERG had no further means of redress in the state courts, as he was punished (by the imposition of counsel fees) for taking an appeal.

ARGUMENT

I. THE RETROACTIVE APPLICATION OF THE WRONGFUL USE ACT CONSTITUTED AN IMPROPER EX POST FACTO LAW.

In Cummings v. Missouri, 4 U.S. (1 Wall.) 277, 325-26 (1866), this Honorable Court defined an Ex Post Facto Law as:

> one which imposes a punishment for an act which is not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was required.

The United States Constitution prohibits the creation of Ex Post Facto laws by Congress and the States. Article I, §9, cl. 3 of the U.S. Constitution prohibits any "bill of Attainder or Ex Post Facto Law or Law impairing the Obligations of Contracts..." Article I, §10 the Constitution prohibits the passage of such laws by the states. U.S. Const. art. I, §10 ("no state shall... pass any Bill of Attainder, Ex Post Facto law, or Law impairing the obligation of Contracts...").

Recalling Britain's abuses while colonists, the Framers of the Constitution included the Ex Post Facto clause in the constitution to prevent tyranny. The Ex Post Facto clause allows citizens to know

the consequence of their acts and prohibits legislative vindictiveness. It does not distinguish between civil and criminal laws. The Framers intended that any retrospective law operate only when required by "necessity and public safety". Jane Harris Aiken, Ex Post Facto in the Civil Context: Unbridled Punishment, 81 Kentucky Law Journal 324-33 (1992-93).

Accordingly, the retroactive application of a civil statute will be found to violate the Ex Post Facto clause if the statute is also punitive. Flemming v. Nestor, 363 U.S. 603, 614, 80 S.Ct. 1367, 1374, 4 L.Ed.2d 1435, 1446 (1960).

In U.S. v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) this Court provided a standard to determine whether a civil statute is punitive. As stated by the Court:

> civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment... a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment.

49 U.S. at 448, 109 S. Ct. at 1901-02, 104 L.Ed.2d at 501-02 (1989)(holding that civil penalty constituted punishment under the Double Jeopardy clause).

The Halper Court went on to state that the imposition of punitive damages

serves punitive goals. Id. at 1901 n.8, citing, Day v. Woodworth, 13 U.S. (1 How.) 363, 14 L.Ed. 181 (1852). The punitive damages provision in the Wrongful Use Statute at issue clearly serves the goals of retribution and deterrence. These goals do not constitute "legitimate nonpunitive governmental objectives." Halper, 190 S. Ct. at 1902. Rather, the statute at bar is intended solely to impose punishment. Since the Ex Post Facto Clause prohibits the retroactive application of punishment, the statute is unconstitutional.

More recently, in Landgraf v. USI Film Products, 511 U.S. _____, 114 S.Ct. 1483, 128 L.E.2d 229 (1994), this Honorable Court specifically stated that the retroactive application of a punitive damages statute raised a serious constitutional question under the Ex Post Facto Clause:

> [t]he very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question.

511 U.S. at _____, 114 S.Ct. at 1505, 128 L.Ed.2d 262 (1994).

This Court declared that the Ex Post Facto clause, on its face, prohibits retroactive application of penal legislation and it held that the Due Process Clause forbids the lack of fair

notice inherent within retroactive statutes. Id. at 1497. Significantly, this Court also found that the very purposes of punitive damages were retribution and deterrence. 114 S.Ct. at 1505.

Although NERNBERG filed the underlying action in March of 1979, the Wrongful Use Act did not become effective until almost two years later, in February of 1981. Nevertheless, as indicated by the record, the jury was permitted to impose punitive damages against NERNBERG under the Act for his pre-Act conduct. The jury was not instructed that proof of malicious conduct was necessary to impose punitive damages as required by the pre-Act law, and in fact, was permitted to infer that Nernberg acted for an improper purpose solely because he lost the underlying case.

II. THE RETROACTIVE APPLICATION OF THE WRONGFUL USE ACT VIOLATED NERNBERG'S RIGHTS TO DUE PROCESS OF LAW.

The retroactive application of the Wrongful Use Statute also offends the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The United States Constitution prohibits the creation of any law which deprives persons of life, liberty, or property, without due process of the law. U.S. Const. amend. V. Amendment XIV, §1 the Constitution also prohibits the passage of such laws by the states. U.S. Const. amend. XIV, §1 ("No State shall... deprive any person of life, liberty, or property, without due process of law").

Legislation violates Substantive Due Process when it infringes upon a Constitutional right. Legislation compromising Constitutional rights must survive strict scrutiny analysis in order to overcome constitutional safeguards. See, Parks v. City of Warner Tovins, et al., 43 F.3d 609, 613, n.2 (11th Cir. 1995); McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994), cert. denied, 115 S.Ct. 898 (1995).

The imposition of retroactive punitive damages violates the literal terms of Due Process. Such laws "deprive persons of property in a manner that is inconsistent with norms of justice and fair play and hence not in accordance with 'due process of law'." Marshall J. Tinkle, Forward into the Past: State Constitutions and Retroactive Laws, 65 TEMP. L. Q. 1253, 1262 (1992).

In Landgraf v. USI Film Products, supra, this Honorable Court refused to permit the retroactive application of a statute imposing punitive damages, based upon fundamental concepts of due process. As stated by the Court:

> the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and conform their conduct accordingly; settled expectations should not be

> lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." Kaiser, 494 U.S., at 855 110 S.Ct., at 1586 (SCALIA, J., concurring). In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.[2]

511 U.S. at _____, 114 S.Ct. at 1497, 128 L.Ed.2d at 252. Significantly, the Court also premised its holding upon the Due Process Clause itself:

> The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause "may not suffice" to warrant its retroactive application. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17, 96 S.Ct. 2882,

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[2] As set forth above, Judge Del Sole and Justice Larsen expressed these very concerns in their dissenting opinions in the present case.

2893, 49 L.Ed.2d 752 (1976).

114 S.Ct at 1497 L.E.2d. 253. In the present case, as in Landgraf, NERNBERG had the right to fair notice that his conduct was actionable and that he could be subject to the imposition of punitive damages solely because he lost the "underlying case." In addition, NERNBERG was deprived of due process when the Supreme Court of Pennsylvania imposed counsel fees against him in connection with his Emergency Application for Special Relief (Appendix, pp. 58 - 74a). As set forth above, NERNBERG was not afforded a hearing prior to the imposition of counsel fees, and, in essence, has been punished for his attempt to exercise his right to review of this case by this Honorable Court.

Accordingly, Petitioner has been deprived of due process of law, and seeks the grant of a Writ of Certiorari by this Honorable Court.

CONCLUSION

In conclusion, the Petitioner respectfully requests this Honorable Court to grant the within Petition for Writ of Certiorari and to reverse the decisions of the Courts below.

Respectfully submitted,
MAURICE A. NERNBERG &
ASSOCIATES

By: _____

Maurice A. Nernberg
301 Smithfield Street
Pittsburgh, PA 15222-2277
(412) 232-0334

Counsel for Petitioner

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

MARIO LUDMER
W.D.

No. 261

ALLOCATUR
DKT. 1994

v.

MAURICE A. NERNBERG, JR.,

Petition for Allowance of Appeal from the Superior Court

PETITIONER

ORDER

PER CURIAM:

AND NOW, this 21st day of July, 1995, the Petition for Allowance of Appeal in the above matter is denied.

Mr. Justice Montemuro is sitting by designation.

A True Copy Irma T. Gardner
as of: July 21, 1995
Test: /S/ Irma T. Gardner
Deputy Prothonotary
Supreme Court of
Pennsylvania

APPENDIX B

IN THE SUPERIOR COURT OF PENNSYLVANIA

MARIO LUDMER,

Appellee,

v . No. 947 Pittsburgh, 1993

MAURICE A. NERNBERG, JR.,

Appellant

Appeal from the Judgment entered June 10, 1993, Court of Common Pleas, Allegheny County, Civil Division at No. GD 84-11881.

BEFORE: BECK, JOHNSON and MONTGOMERY, JJ.

OPINION BY JOHNSON, J.:
FILED: April 21, 1994

Attorney Maurice A. Nernberg, Jr. appeals from the judgment entered following a jury award of $25,000 in compensatory damages and $50,000 in punitive damages to Mario Ludmer, M.D., in an action brought pursuant to the Wrongful Use of Civil Proceedings Act (the Act), 42 Pa.C.S. § 8351 et seq. We affirm.

In June 1984, Ludmer brought this civil action seeking damages pursuant to the Act, following the entry of summary

judgment in his favor in an earlier case instituted by Nernberg against Ludmer, docketed at GD79-6085 in the Court of Common Pleas of Allegheny County, aff'd, Nernberg v. Ludmer, 313 Pa.Super. 596, 460 A.2d 847 (1983), appeal denied, September 14, 1983.

Nernberg filed preliminary objections alleging that since his action preceded the effective date of the Act, February 19, 1981, the Act did not apply. The trial court granted Nernberg's preliminary objections and dismissed Dr. Ludmer's complaint. Allegheny County Court of Common Pleas Docket No. G.D. 84-11881.

On appeal, we reversed. Ludmer v. Nernberg, 355 Pa.Super. 639, 509 A.2d 1325 (1987). The Supreme Court of Pennsylvania affirmed our determination, holding that Nernberg's actions were subject to the Act. Ludmer v. Nernberg, 520 Pa. 218, 553 A.2d 924 (1989). The underlying facts of this case, which are undisputed, were summarized as follows:

> [Dr.] Mario Ludmer, [a board certified neurosurgeon,] was the treating physician for one of [Nernberg]'s clients, [Margaret O'Toole], in a personal injury lawsuit. In preparation for the litigation, [Nernberg] had requested that Dr. Ludmer prepare a written report of his examination and a diagnosis of the client's medical condition. Dr. Ludmer submitted a report and offered to testify at trial if necessary to clarify his position. During the personal injury trial, the defendant's wife became ill, resulting in

> the plaintiff instructing Nernberg to negotiate a settlement rather than seeking a continuance.
>
> After settling the personal injury action, [Nernberg] then commenced a lawsuit against [Dr. Ludmer] claiming that [Dr. Ludmer] did not properly cooperate with him in the preparation of the personal injury action and that [Dr. Ludmer] had interfered with the contractual relationship between [Nernberg] and his client. As a result of [Dr. Ludmer's] actions, [Nernberg] alleged that he was forced to settle the personal injury action for less money. Following the completion of discovery, [Dr. Ludmer] filed a motion for summary judgment which was granted.

Id. at 219-220, 553 A.2d at 925.

Following the subsequent jury trial in the present case, Ludmer was awarded damages of $75,000. This appeal followed the denial of Nernberg's motion for judgment notwithstanding the verdict or, in the alternative, a new trial.

Our standard of review of an order denying judgment n.o.v. is limited: we must determine whether there was sufficient competent evidence to sustain the verdict. Wenrick v. Schloemann-Siemag Aktiengesellschaft, et al., 523 Pa. 1, 4, 564 A.2d 1244, 1246 (1989). See also Cummings v. Borough of Nazareth, 427 Pa. 14, 25-26, 233 A.2d 874, 881 (1967),

appeal after remand, 430 Pa. 255, 242 A.2d 460 (1968); Ingrassia Construction Co., Inc. v. Walsh, 337 Pa.Super. 58, 64-65, 486 A.2d 478, 480 (1984). In so doing, we must grant the verdict winner the benefit of every inference which reasonably may be drawn from the evidence. We also must reject all unfavorable testimony and inferences. Ingrassia, supra. See also Lira v. Albert Einstein Medical Center, 384 Pa.Super. 503, 508, 559 A.2d 550, 552 (1989); Jewell v. Beckstine, 255 Pa.Super. 238, 386 A.2d 597 (1978). Judgment n.o.v. may be granted only in clear cases, where the facts are such that no two reasonable minds could fail to agree that the verdict was improper. Gray v. H.C. Duke & Sons, Inc., 387 Pa.Super 95, 563 A.2d 1201 (1989); Frank v. Peckich, 257 Pa.Super. 561, 391 A.2d 624 (1978). We note that judgment n.o.v. may not be employed to invade the province of the jury. Thus, questions of fact must be resolved by the jury. Trawick v. Nationwide Mutual Insurance Co., 242 Pa.Super. 271, 363 A.2d 1265 (1976).

Our standard of review of an order denying a motion for a new trial is whether the trial court clearly and palpably abused its discretion or committed an error of law which controlled the outcome of the case. Stevenson v. General Motors Corp., 513 Pa. 411, 413, 521 A.2d 413, 420-21 (1987); see also Solomon v. Baum, 126 Pa.Cmwlth. 646, 560 A.2d 878 (1989). The trial court's order must be affirmed if the record supports the decision of the trial court. See Stevenson, supra.

On appeal, Nernberg raises the following issues:

1. Did Ludmer fail to prove a prima facie case for wrongful use of civil proceedings?

2. Did the trial court improperly exclude evidence of rulings favorable to Nernberg in the underlying case?

3. Did the trial court err in permitting Ludmer's counsel to testify and to inject his personal opinions into the case?

4. Did the trial court improperly permit Ludmer's expert to testify beyond his report, and to express his opinion on the ultimate issue in the case?

5. Did the trial court err in submitting the issue of punitive damages to the jury?

6. Was Nernberg otherwise deprived of a fair trial?

Initially, Nernberg contends that Ludmer failed to prove a prima facie case for wrongful use of civil proceedings. We disagree. Wrongful use of civil proceedings "is a tort which arises when a party institutes a lawsuit with a malicious motive and lacking probable cause." Rosen v.Bank of Rolla, 426 Pa.Super. 376, 380, 627 A.2d 190, 191 (1993), citing Shaffer v. Stewart, 326 Pa. Super. 135, 138, 473 A.2d 1017, 1019 (1984). This tort is now a statutory action and has been codified at 42 Pa. C.S. §8351, as follows:

§ 8351. Wrongful use of civil proceedings.

(a) Elements of action.-A person who takes part in procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings.

(1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and

(2.) The proceedings have terminated in favor of the person against whom they are brought.

42 Pa.C.S. § 8351 (a) (1) - (2).

To prevail in an action for wrongful use of civil proceedings, a plaintiff must prove: (1) the proceedings terminated in his or her favor; (2) the defendant caused those proceedings to be instituted without probable cause; and, (3) malice. Rosen, supra, at 382, 627 A.2d at 191-92. The state tort definition of this tort agrees

with the Restatement (Second) of Torts § 674. Robinson v. Robinson, Pa. Super. 568, 574, 525 A.2d 367, 370 (1987); Shaffer v. Stewart, supra, at 140, 473 A.2d at 1020.

As the trial court correctly noted, for Nernberg to succeed on a motion for judgment n.o.v., he must convince the trial court that Dr. Ludmer had not satisfied each element of the cause of action. The plaintiff's burden of proof is as follows:

> (1) The defendant has procured, initiated or continued the civil proceedings against him.
>
> (2) The proceedings were terminated in his favor.
>
> (3) The defendant did not have probable cause for his action.
>
> (4) The primary purpose for which the proceedings were brought was not that of securing the proper discovery, joinder of parties or adjudication of the claim on which the proceedings were based.
>
> (5) The plaintiff has suffered damages as set forth in [the statute].

42 Pa.C.S. § 8354.

The trial court analyzed this issue as follows:

> The jury found that Nernberg did not have probable cause to initiate a suit against Ludmer solely for the purpose of collecting a fee which [Nernberg] claimed was due him as a result of a third party action in which he represented a plaintiff (O'Toole) against a defendant. The evidence was clear that O'Toole never authorized the suit against Ludmer and that she never desired to be a party to that suit filed by Nernberg. In addition, Nernberg continued to prosecute that action even after the Court of Common Pleas of Allegheny County found that there was no merit to his claim and that the claim was personal to O'Toole. After receiving the Opinion to that effect from the Court, Nernberg continued to press the issue to the Superior Court which held that his claim against Ludmer was totally without merit. Notwithstanding the decision of the Superior Court, Nernberg petitioned for allowance of appeal in the Supreme Court which was summarily denied.

Trial Court Opinion of the Honorable Gerard M. Bigley, dated August 23, 1993, at 3-4.

Granting Dr. Ludmer, as the verdict winner, the benefit of every inference which reasonably may be drawn from the evidence and rejecting all

unfavorable testimony and inferences, we agree with the trial court and conclude that there was sufficient and competent evidence to establish a prima facie case. Clearly, as the trial court determined, the jury was justified in its belief that Ludmer had met his burden to prove each element required by § 8354. Id.

Nernberg raises an additional argument. Nernberg asserts that Dr. Ludmer offered "no competent evidence whatsoever" that Nernberg acted for an improper purpose in the underlying case. Appellant's Brief at 16. As Ludmer observes in his brief at 13, Nernberg's unstated argument is that improper purpose can be established only be the defendant "confessing" that he acted for an improper purpose. Such arguments are not only unseemly, but contrary to the settled law of this Commonwealth.

In a similar case, Shaffer v. Stewart, supra, this Court found that there was evidence form which the jury could infer that the defendant acted for an improper purpose. There, the defendant, an attorney, after agreeing voluntarily to the dismissal of his clients' claims, knew that persons on whose behalf he filed a caveat to a will had no standing to contest the probate of the decedent's will. Id. at 142, 473 A.2d at 1020-21. Cf., Panitz v. Behrend, _____ Pa.Super. _____, 632 A.2d 562 (1993) (allowing a party to litigation to contract with an expert witness and thereby obligate the witness to testify only in a manner favorable to that party on threat of civil liability would be contrary to public policy).

Here, Nernberg had previously advised Mrs. O'Toole by letter that he would take

no action without her consent; this letter implicitly acknowledged that her consent was required to bring an action against Dr. Ludmer. However, Mrs. O'Toole responded that she would not be a party to such an action. N.T., November 9-10, 12, 1992 at 290-92. Nernberg brought the suit against the express wishes of his client. Indeed, this is evident from Nernberg's testimony: Nernberg testified that (1) Mrs. O'Toole did not know that the underlying action had been filed by Nernberg against Dr. Ludmer at the time it was filed; (2) it was three to four months later that she discovered Dr. Ludmer had been sued; (3) if consulted she would not have joined such an action; (4) she had no claim against Dr. Ludmer; and, (5) she was never asked to be a party to the action. Id. at 277-92. Moreover, it is the function of the jury to evaluate evidence introduced at trial to reach a determination. Riddle Memorial Hospital v. Dohan, 504 Pa. 571, 475 A.2d 1314 (1984) . Where, as here, a verdict is based on substantial, albeit, conflicting evidence, it is conclusive on appeal. Standard Pipeline Coating Co., Inc. v. Solomon & Teslovich, Inc., 344 Pa.Super. 367, 496 A.2d 840 (1985), appeal denied, October 30, 1986. It is not the role of an appellate court to pass on the credibility of witnesses or to act as the trier of fact; we will not substitute our judgment for that of a fact-finding jury. Id.

Next, Nernberg contends that the trial court improperly excluded rulings favorable to him in the underlying case. Questions concerning the or the exclusion of evidence are within the sound discretion of the trial court and will not

be reversed on appeal absent a clear abuse of discretion. Engle v. West Penn Power Co., 409 Pa.Super, 462, 598 A.2d 290 (1991), appeal denied, 529 Pa. 669, 605 A.2d 334 (1992) (table); Concorde Investments, Inc. v. Gallagher, 345 Pa.Super. 49, 497 A.2d 637 (1985). Nonetheless, Nernberg argues that in the underlying case the dismissal of Dr. Ludmer's demurrer to the complaint and the grant of a motion to permit the taking of depositions are conclusive evidence that Nernberg had probable cause in the underlying case. In support of this contention, Nernberg's Brief quotes a fragment of the Restatement (Second) of Torts § 675, Comment b, as follows:

> A decision by a competent tribunal in favor of the person initiating civil proceedings is conclusive evidence of probable cause. This is true although it is reversed on appeal and finally terminated in favor of the person against whom the proceedings were brought.

Comment b to Section 675 is incomplete as quoted by Attorney Nernberg. The first paragraph of Comment b, in full text, begins:

> b. Effect of termination in favor of the person against whom the proceedings were brought. As in the case of the initiation of criminal proceedings, a decision by a competent tribunal in favor of the person initiating civil proceedings is conclusive evidence of probable cause.

> This is true although it is reversed on appeal and finally terminated in favor of the person against whom the proceedings were brought. Likewise, a termination of civil proceedings by a competent tribunal adverse to the person initiating them is not evidence that they were brought without probable cause (citations omitted).

From the context of Comment b, it is apparent that "decision" refers to the termination of the proceedings and not to decisions on procedural matters prior to the termination of the case. Moreover, the cases on which Nernberg relies are inapposite. Miller v. Pennsylvania Railroad Co., 371 Pa. 308, 89 A.2d 809 (1952); Kelley v. Local Union 249, 518 Pa. 517, 544 A.2d 940 (1988); and, DeSalle v. Penn Central Transportation Co., 263 Pa. Super. 485, 398 A.2d 680 (1979), concern malicious prosecution, not wrongful use of civil process. Miller and DeSalle both involve plaintiffs who were indicted by grand juries and held for court by district magistrates. In Kelley, the plaintiff was also held for court by a district magistrate after the district attorney had approved criminal charges.

The Restatement (Second) of Torts § 663 (2) states that in criminal proceedings, "[t]he magistrate's commitment of the accused is evidence that the person initiating the proceedings had probable cause." Hence, it was undisputed that the three individuals who initiated proceedings in these malicious prosecution cases had probable cause despite the

acquittal of the three plaintiffs in the underlying criminal actions. However, the action brought by attorney Nernberg was civil. No district magistrate held Ludmer for court and there was disputed testimony as to probable cause. Here, the jury determined that Attorney Nernberg lacked probable cause. Factual conflicts are for the jury to resolve, not this Court. Miller, supra. We find this contention to be without merit.

Next, Nernberg complains that the trial court improperly allowed Dr. Ludmer's counsel to testify regarding legal fees. Nernberg also asserts that, by testifying, Dr. Ludmer's counsel violated Rule 3.7 of the Pennsylvania Rules of Professional Conduct. Appellant Brief at 22. He is mistaken. In his Brief, at 24, Nernberg quotes what he calls the "relevant part" of Rule 3.7, as follows:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness
>
> ....

However, Rule 3.7 reads, in pertinent part, as follows:

> Rule 3.7 Lawyer as witness
>
> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> ....

(2) the testimony relates to the nature and value of legal services rendered in this case;

....

In addition, it is well-established that violations of the rules of professional responsibility are not a proper subject for the consideration of any tribunal other than those authorized by the Pennsylvania Supreme Court. Reilly by Reilly v. Southeastern Pa. Transportation Authority, 507 Pa. 204, 489 A.2d 1291 (1985). This claim is baseless.

Nernberg also complains that Dr. Ludmer's counsel testified as to his "beliefs." Nernberg objected to only one of these remarks and this objection was sustained by the trial court. Since no objection to the remaining remarks was raised at trial, we deem this issue waived. See Pa.R.A.P. 302; 2117(c).

Next, Nernberg contends that the trial court improperly admitted testimony of an expert witness for Dr. Ludmer. Nernberg then presents us with a critique of that testimony. The trial court is granted broad discretion in determining whether testimony of a particular expert ought to be admitted into a case, and unless there is a clear abuse of that discretion, no basis for reversal will be established. Bossier v. Lee Hospital, 399 Pa.Super. 322, 582 A.2d. 369 (1990), appeal denied, 527 Pa. 614, 590 A.2d 755 (1991). Again, our review of this record fails to disclose error by the trial court.

Nernberg also alleges that the trial

court erred in submitting the issue of punitive damages to the jury. However, this allegation ignores the statute which expressly provides for punitive damages. 42 Pa.C.S. § 8353(6). Nernberg makes the audacious assertion that the trial court's instruction that the jury consider both Nernberg's net worth and his financial status was in violation of an earlier order of Judge Musmanno "dated January 3, 1992, which held that only Nernberg's net worth would be admissible on the issue of punitive damages. Appellant's Brief at 33 (emphasis added). The relevant paragraph of Judge Musmanno's order reads as follows:

> It is further ORDERED and DECREED that Defendant Maurice A. Nernberg, Jr., shall forward within forty-five (45) days from the date hereof to counsel for the Plaintiff, Seymour A. Sikov, Esquire, his current net worth statement, same to reflect the Defendant's net worth as of a date no later than ninety (90) [days] prior to the date hereof, this to be under verification of the Defendant, same not to be filed of record and same not to be disclosed to any third party without an Order of Court.

It is readily apparent that the word "only" does not appear in this paragraph. In addition, the following exchange took place with respect to this jury instruction:

> THE COURT: Yeah. So that will read, "In assessing punitive

> damages you may consider the Defendant's net worth and financial condition. You heard testimony from Attorney Nernberg regarding these matters." I'm going to use [that], okay.
>
> Mr. Beldon (counsel for Attorney Nernberg): That's fine.
>
> THE COURT: All right.

N.T., November 18-20, 1992, at 1341. We find this claim to be waived on the basis of Dilliplane v. Lehigh Valley Trust Co., 457 Pa. 255, 322 A.2d 114 (1974). Dilliplane requires that trial counsel make timely, specific objections during trial to "ensure that the trial judge has a chance to correct alleged errors" at trial and to allow the "orderly and efficient use of our judicial resources" as well as to reduce the need for appellate review and new trials. Id. at 258-59, 322 A.2d at 116. This contention has been waived.

Finally, Nernberg maintains that he was denied a fair trial. This claim is supported by a ten page list of numerous rulings by the trial court, approximately fifty in number, and a claim that these errors, when considered together, deprived him of a fair trial. We disagree. From our review of this record, we conclude that Nernberg's contention that he was denied a fair trial is without merit.

Accordingly, for the foregoing reasons, we affirm the judgment entered on June 10, 1993.

Judgment Affirmed.

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

Mario Ludmer

v. No. 947 Pittsburgh 1993

Maurice A. Nernberg, Jr.,

Appellant

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Allegheny County be, and the same is hereby AFFIRMED.

BY THE COURT:

/S/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

DATED: April 21, 1994

APPENDIX C

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MARIO LUDMER, CIVIL DIVISION

Plaintiff, No. GD84-11881

vs.

MAURICE A. NERNBERG, JR., OPINION

Defendant.

Filed By:
Honorable Gerard M. Bigley
817 City-County Building
Pittsburgh, PA 15219
(412) 355-4434

Copies sent to:

H. Reginald Belden, Esq.
117 North Main Street
Greensburg, PA 15601

James R. Cooney, Esq.
301 Smithfield Street
Pittsburgh, PA 15222

Seymour A. Sikov, Esq.
1400 Lawyers Building
Pittsburgh, PA 15219

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MARIO LUDMER,

Plaintiff,

v. CIVIL DIVISION
No. GD84-11881

MAURICE A. NERNBERG,

Defendant.

OPINION

BIGLEY, J.

The Plaintiff, Mario Ludmer (Ludmer), filed suit against the Defendant, Maurice A. Nernberg (Nernberg), claiming damages as a result of the Defendant's conduct in violation of the Wrongful Use of Civil Proceedings Act ("Act"), 42 Pa. C.S.A. §8351-8354. The suit was begun by Ludmer after the entry of a Summary Judgment in his favor against Nernberg in a case filed by Nernberg against Ludmer in the Court of Common Pleas of Allegheny County at GD79-6085. That Judgment was affirmed by the Superior Court of Pennsylvania and Allocatur was denied by the Supreme Court on September 14, 1983.

The present case proceeded to a jury trial which began on November 9, 1992 and concluded on November 20, 1992 with the jury awarding Ludmer the sum of $25,000.00 in compensatory damages and $50,000.00 in punitive damages. Timely Post-Trial Motions were filed by the Defendant. After argument on the Motions, they were denied on June 8, 1993. Nernberg then

filed his Notice of Appeal on June 15, 1993.

In the Post-Trial Motions, Nernberg requested that the Court either grant him a Judgment N.O.V. or a New Trial. This Opinion will address the merits of each separately.

In order for a judgment N.O.V. to be granted, it must be clear that, after reviewing all of the evidence presented in the light most favorable to the verdict winner, no two reasonable minds could fail to agree that the verdict was improper. Also, any and all doubts raised by the evidence must be resolved in favor of the successful verdict winner. Robertson v. Atlantic Richfield Petro, 537 A. 2d 814 (1987). In addition, the only evidence which must be considered by the Court is that which supports the verdict. The verdict winner must be given the benefit of all doubt and of every fact and inference which is supported by the evidence produced.

In order for Nernberg to succeed in his Motion for Judgment N.O.V. he must convince the Court that Ludmer had not satisfied, by the evidence presented, each and every element of his cause of action as required by the "Act." The "Act" requires that a successful plaintiff establish the following:

1. The defendant has procured, initiated or continued the civil proceedings against him.

2. The proceedings were terminated in his favor.

3. The defendant did not have probable cause for his action.

4. The primary purpose for which the proceedings were brought was not that of securing the proper discovery, joinder of parties or adjudication of the claim on which the proceedings were based.

5. The plaintiff has suffered damages pursuant to the statute.

Insofar as requirements 1 and 2, the Defendant admitted that Plaintiff had met his burden of proof. As for items 3, 4 and 5, Nernberg contends that the jury erred in resolving the facts presented against him and finding that Ludmer had met his burden of proof as tc these requirements.

The jury found that Nernberg did not have probable cause to initiate a suit against Ludmer solely for the purpose of collecting a fee which he claimed was due him as a result of a third party action in which he represented a plaintiff (O'Toole) against a defendant. The evidence was clear that O'Toole never authorized the suit against Ludmer and that she never desired to be a party to that suit filed by Nernberg. In addition, Nernberg continued to prosecute that action even after the Court of Common Pleas of Allegheny County found that there was no merit to his Claim and that the claim was personal to O'Toole. After receiving the Opinion to that effect from the Court, Nernberg continued to press the issue to the Superior Court which held that his claim against Ludmer was totally without merit. Notwithstanding the decision of the Superior Court, Nernberg petitioned

for Allowance of Appeal in the Supreme Court which was summarily denied. Clearly, the jury was justified in its belief that items 3 and 4 of the "Act" had been met by Ludmer.

The Plaintiff, in his Complaint, requested both compensatory and punitive damages be awarded against Nernberg. Item 5 of the "Act" requires that a successful plaintiff prove that he has suffered damages as a result of the actions of a defendant.

Dr. Ludmer testified that he was required to expend money for legal fees as a result of the suit being filed by Nernberg. Although the reasonableness of the fees was contested, there was ample evidence presented to the jury which justified the requirement that Ludmer had sustained actual damage.

It was also the province of the jury to determine if the conduct of Nernberg was so outrageous that punitive damages were also appropriate. The Act in Section 8353(6) specifically allows an award of those damages. Section 908 of the Restatement of Torts which has been adopted by the Superior Court of Pennsylvania (Dean Witter Reynolds, Inc. v. Genteel, 346 Pa. Super. 366, 499 A. 2d 637 (1985)) defines punitive damages as:

1. Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.

2. Punitive damages may be awarded for conduct that is outrageous,

> because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

It was not unreasonable for the jury, after listening to all of the evidence, to enter a verdict against Nernberg in the amount of $50,000.00 as punitive damages.

Nernberg also alleges that as a result of the Court's rulings he has been severely prejudiced and is entitled to a new trial. The Court has carefully and thoroughly reviewed the 1,485 pages of the transcript of the trial and finds no error in any of its rulings or, if error was committed, it was not such as to be prejudicial to the Defendant.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MARIO LUDMER,

Plaintiff,

v. CIVIL DIVISION
No. GD84-11881

MAURICE A. NERNBERG,

Defendant.

ORDER OF COURT

AND NOW, to-wit, this 23rd day of August, 1993, based upon the reasons set forth in the foregoing Opinion, Defendant's Post-Trial Motions were denied.

BY THE COURT:

/S/ Bigley J.

APPENDIX D

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

MARIO LUDMER, Appellee v. MAURICE A. NERNBERG, JR., Appellant	No.46 W.D. Appeal Docket 1987 Appeal from Order of Superior Court dated February 26, 1986, and April 29, 1986 (reargument denied) at No. 1275 Pittsburgh 1984, which reversed the Order of the Court of Common Pleas of Allegheny County, Civil Division, dated September 20, 1984, at No. G.D. 84-11881 355 Pa. Super. 639 509 A.2d 1325 (1986) ARGUED: March 7, 1988

OPINION

JUSTICE ZAPPALA FILED: FEBRUARY 3, 1989

We are called upon in this appeal to review the order and memorandum opinion of the Superior court reversing the order of the Court of Common Pleas of Allegheny

County which had granted the Appellant's preliminary objections. At issue here is whether the Wrongful Use of Civil Proceedings Act ("Act") as set forth in 42 Pa. C.S. §§ 8351-8354 is applicable to a complaint which was filed prior to the effective date of the Act, although not adjudicated until after the effective date of the Act. The critical facts are not in dispute. The Appellee, Mario Ludmer, is a medical doctor who was the treating physician, for one of the Appellant's clients in a personal injury lawsuit. In preparation for the litigation, the Appellant, Maurice A. Nernberg, Jr., had requested that Dr. Ludmer prepare a written report of his examination and a diagnosis of the client's medical condition. Dr. Ludmer submitted a report and offered to testify at trial if necessary to clarify his position. During the personal injury trial, the defendant's wife became ill, resulting in the plaintiff instructing Nernberg to negotiate a settlement rather than seeking a continuance.

After settling the personal injury action, the Appellant then commenced a lawsuit against the Appellee claiming that the Appellee did not properly cooperate with him in the preparation of the personal injury action and that the he had interfered with the contractual relationship between the Appellant and his client. As a result of the Appellee's actions, the Appellant alleged that he was forced to settle the personal injury action for less money. Following the completion of the discovery, the Appellee filed a motion for summary judgment which was granted. On appeal the Superior Court affirmed and we denied allocatur. Nernberg

v. Ludmer, 313 Pa. Super. 596, 460 A.2d 847 (1983).

The Appellee then commenced this present action seeking damages pursuant to the Act. The Appellant filed preliminary objections alleging that the Appellee had failed to allege an arrest or seizure of property which heretofore was a basic requirement of the existing common law necessary for recovery. Furthermore, the Appellant argued that the Act was inapplicable because his complaint against the Appellee was filed prior to the effective date of the Act. The trial court granted the preliminary objections and dismissed the Appellee's complaint. On appeal, the Superior Court reversed holding that the Appellee's cause of action did not accrue until he successfully defeated the Appellant and his complaint. At that time, the Act was applicable thereby giving the Appellee a proper cause of action. We granted the Appellant's Petition for Allowance of Appeal and now affirm.

The Appellant raises two issues for our review: whether the Superior Court has improperly applied the Act retroactively in this case, and assuming the Act was applicable, whether the Appellee set forth sufficient facts to support his cause of action.

Prior to February 19, 1981, the effective date of the Act, a person wronged by the initiation of a lawsuit could either allege a common law malicious use of process or an abuse of process. Puplix Drug Co. v. Breyer Ice Cream Co., 347 Pa. 346, 32 A.3d 413 (1943). To sustain a cause of action, a claimant was required to allege an arrest of the person or a seizure of property. Under the Act,

the legislature specifically abrogated this requirement.

> (b) Arrest or seizure of person or property not required. - The arrest or seizure of the person or property of the plaintiff shall not be a necessary element for an action brought pursuant to this sub-chapter.

42 Pa.C.S.A. §8351(b), Thus it is critical whether the Act or the common law is applicable. There is no disagreement that the appellee has not alleged an arrest or seizure of property. If the Act is applicable, this allegation is unnecessary; however, if the common law is applicable, the failure to allege one of these factors is fatal to the cause of action.

The Appellant argues that to make the Act applicable to Appellee 's cause of action would result in a retroactive application of the Act. To support his position, the Appellant argues that under the Act the key element for establishing a cause of action is the wrongful initiation of a lawsuit. Since the underlying lawsuit filed by the Appellant against the Appellee was filed in March of 1979, the Act was not in existence and therefore the Appellant argues that the cause of action did not exist. To permit the current cause of action to continue would thus result in applying the Act to a cause of action which occurred two years prior to its existence. Thus, applying the Act to the case sub judice will result in a retroactive application of the Act.

If we were to accept the Appellant's initial premise then the logical extension

of his argument would be correct. However, since we do not accept his initial argument that the cause of action occurs at the time the underlying lawsuit is commenced, we cannot accept his argument on retroactivity.

Under the Act, a person who participates in the initiation or continuation of a civil action is subject to liability for wrongful use of civil process if he acts in a grossly negligent manner or without probably cause and the proceedings are terminated against him.[3]

---

[3]1. Wrongful use of civil proceedings

(a) Elements of action.-A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings:

> (1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and
>
> (2) The proceedings have terminated in favor of the person against whom they are brought.

(b) Arrest or seizure of person or property not required.-The arrest or

The elements required to successfully pursue a cause of action under the Act are the initiation of a lawsuit without probable cause or in a grossly and negligent manner and a favorable outcome in that lawsuit. Although the initiation of a lawsuit is one element of the cause of action, the cause of action does not accrue until all the requirements have been met which includes obtaining a favorable outcome. Kapil v. Association of Pennsylvania State Colleges and Facilities, 504 Pa. 92, 470 A.2d 482 (1983); Sicola v. First National Bank of Altoona, 404 Pa. 18, 170 A.2d 584 (1961). Furthermore, the fact that some of the requirements for application of a statute occur prior to the enactment of the statute, does not result in the retroactive application of that statute. Gehris v. Commonwealth of Pennsylvania, Department of Transportation, 471 Pa. 210, 369 A.2d 1271 (1977). The Appellee's cause of action did not accrue until such time as he successfully defeated the Appellant in his attempts to have the Appellee held legally liable. In this instance, that did not occur until we denied allocatur on September 14, 1983. Having obtained a successful determination in the Appellant's cause of action, Appellee had met, at least arguably, all the elements of a cause of action under the Act. Thus, the Act was not being

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seizure of the person or property of the plaintiff shall not be a necessary element for an action brought pursuant to this sub-chapter.

applied retroactively to events occurring in March of 1979, but rather prospectively to events occurring in September of 1983. Therefore, there is no merit to the Appellant's contention that the Act is being impermissibly applied retroactively.[4]

Next, the Appellant argues that even if the Act applies Appellee failed to allege a cause of action because he failed to set forth with specificity facts supporting an allegation that the Appellant acted without probable cause in initiating the underlying lawsuit. We have reviewed the complaint and are satisfied that the allegations contained therein do not set forth conclusions of law but rather facts upon which the trier of fact could reasonably conclude that the Appellant initiated the underlying lawsuit without probable cause. Therefore, seeing no vitality or validity to either of the Appellant's arguments, the order of the Superior Court must be affirmed.

Order affirmed.

Mr. Justice McDermott files a Concurring Opinion.

Mr. Justice Larsen files a Dissenting Opinion.

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[4] 2. In support of his position the Appellant relies upon Ace v. Argonaut Insurance Company, 307 Pa. Super. 200, 452 A.2d 1384 (1982). In that case, the cause of action accrued one year prior to the effective date of the Act. Therefore, the Act was inapplicable and reliance upon that case is misplaced.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

MARIO LUDMER, Appellee v. MAURICE A. NERNBERG, JR., Appellant	No. 46 W.D. Appeal Dkt. 1987 Appeal from Order of Superior Court dated February 26, 1986 and April 29, 1986 (Reargument denied) At No. 1275 Pittsburgh 1984, which reversed the Order of the Court of Common Pleas of Allegheny County, Civil Division, dated September 1984, at No. G.D. 84-11881. 355 Pa. Super. 639 509 A.2d 1325 (1986) Argued: March 7, 1988

CONCURRING OPINION

MR. JUSTICE MCDERMOTT
FILED: FEBRUARY 3, 1989

The pertinent language of the Wrongful Use of Civil Proceedings Act[5] states:

> [A] person who takes part in the procurement, initiation or

[5] Act of Dec. 19 ,1980, P.L. 1296 No. 232 Section 1.

> continuation of [wrongful] civil proceedings against another is subject to liability. 42 Pa.C.S. section 8351 (a).

In this case, although one could dispute whether a cause of action should lie for the initiation of suit, there is no doubt that appellant continued his suit after the statutory cause of action was enacted. Because of this fact appellant can be subject to liability.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

MARIO LUDMER, Appellee v. MAURICE A. NERNBERG, JR., Appellant	No. 46 W.D. Appeal Dkt. 1987 Appeal from order of Superior Court dated February 26, 1986 and April 29, 1986 (Reargument denied) At No. 1275 Pittsburgh 1984, which reversed the Order of the Court of Common Pleas of Allegheny County, Civil Division, dated September 1984, at No. G.D. 84-11881. 355 Pa. Super. 639

DISSENTING OPINION

JUSTICE ROLF LARSEN
FILED: FEBRUARY 3, 1989

I dissent. Under traditional principles of the common law, malicious use of the civil process had to do with the wrongful initiation of that process by the filing of an underlying action. In this case the underlying action was a suit in assumpsit and trespass initiated on March 5, 1979 by the appellant, Maurice A. Nernberg, Jr. (Nernberg) against the appellee, Mario Ludmer (Ludmer). On September 14, 1983, more than four years

after commencement, the underlying suit was terminated in favor of Ludmer when this court denied Nernberg's petition for allocatur.

At the time the underlying suit was commenced, the essential elements of an action for malicious use of civil process, as established by the common law, were: (a) that the process was initiated without probable cause and with malice; (b) that there was a seizure or interference with the claimant or claimant's property; and (c) that the underlying suit was terminated in favor of the claimant. Publix Drug Co. v. Breyer Ice Cream Co., 347 Pa. 346, 32 A.2d 413 (1943). Under the common law an action for malicious use of civil process did not arise unless there was an arrest of the person or a seizure of property. Id.

After Nernberg filed the underlying lawsuit against Ludmer, and while it was pending, the legislature codified the law pertaining to an action for malicious use of civil process by the enactment of the wrongful use of process statute, 42 Pa. C.S.A. § 8351, effective February 17, 1981. In codifying the law, the legislature specifically eliminated arrest or seizure of the person or property of the claimant as a necessary element of the cause of action. 42 Pa. C.S.A. § 8531(b) Henceforth, an action for wrongful use of civil proceedings may be maintained if the claimant establishes: (a) that the underlying suit was brought in a grossly negligent manner and without probable cause; and (b) the proceedings terminated in favor of the person against whom they were commenced. 42 Pa. C.S.A. § 8531(1) & (2).

There is no dispute that Ludmer's complaint for malicious or wrongful use of the civil process avers a cause of action under the statute, 42 Pa. C.S.A. § 8531. He alleges that the underlying suit was brought by Nernberg in a grossly negligent manner and without probable cause; and it was terminated in his favor. On the other hand, Ludmer's complaint does not allege an arrest of his person or a seizure of his property and therefore fails to state a cause of action under the common law.

The majority holds that the statute (42 Pa. C.S.A. §8531) applies to the facts of this case and that Nernberg's demurrer should be overruled. I disagree and would hold that the common law is controlling and that the lower court's action in sustaining the demurrer and dismissing Ludmer's complaint was proper.

The majority concludes that since a cause of action for wrongful use of the civil process does not accrue until all of the requirements have been met, the cause of action in this case did not arise until September 14, 1983 when we denied allocatur in the underlying suit. It was then that the underlying suit was terminated in favor of Ludmer. The majority thus, rejects the cogent argument that by applying the requirements of the statute (42 Pa. C.S.A. § 8531) rather than the common law to Ludmer's complaint, an impermissible retroactive application of that statute is being sanctioned. The majority instead holds that the statute is actually being applied prospectively to events occurring in September of 1983. (Slip Opinion, p.6). I disagree.

There is no question that we have held: "That a statute does not operate retrospectively merely because some of the

facts or conditions upon which its application depends came into existence prior to its enactment." Gehris v. Commonwealth of Pennsylvania Department of Transportation, 471 Pa. 210, 369 A.2d 1271, 1273 (1977). This principle, however, does not apply to the facts of the present case. This is simply not a situation where the statute is being applied prospectively even though some of the facts or conditions came into existence before its effective date. Here, prior to the enactment of 42 Pa. C.S.A. §8531, an essential fact or condition to a cause of action for malicious use of process, namely, an arrest of the person or a seizure of property did not exist as a part of Nernberg's underlying lawsuit. Thus, no cause of action for malicious use of process could be maintained against Nernberg as a result of his filing the underlying action even though it may eventually terminate in favor of Ludmer.

The statute, (42 Pa. C.S.A. § 8531) in effect, created a new and somewhat different cause of action by eliminating the arrest or seizure requirement as an element of the offense. Thus, a suit initiated in March of 1979 that could not become actionable regardless of an outcome in favor of the defendant, became potentially actionable in February of 1981 and the majority now applies the new standard to past, irreversible conduct which occurred almost two years before the statute became law. That amounts to improper retroactive application of the statute.

The majority is impressed with the fact that the underlying lawsuit was finally terminated on September 14, 1983,

more than two years after the effective date of 42 Pa. C.S.A. §8531. This emphasis on the time of termination is misplaced. Under both the common law and the relevant statute, it is not the event of termination in favor of the person against whom the suit was brought that gives rise to a cause of action. If that were so, then anytime a defendant prevailed in a lawsuit, he would, as a result of the favorable termination, have an action for wrongful use of civil proceedings against the person who sued him. The termination of the lawsuit must be related back to the facts and circumstances existing at the time it was initiated. Thus, if A, as claimant, files suit against B, as defendant, and four years later the case is finally terminated in favor of B, this favorable termination in and of itself does not give rise to a cause of action for malicious or wrongful use of civil process in favor of B. It is necessary, in such a situation, to refer back to the circumstances of the initiation of the suit to determine if a cause of action exists. If at the time the suit was commenced the common law was the prevailing law, as it was in March of 1979, then it is to the requirements of the common law that we must look. Under the common law, if the initiation of a lawsuit involved the lack of probable cause and malice, and an arrest of the person or a seizure of property, it was those circumstances coupled with termination in favor of the person against whom the suit was brought that gave rise to a cause of action for malicious use of civil process.

When Nernberg filed the underlying lawsuit against Ludmer, the actions he

took at that time could not make him subject to a suit for malicious use of civil process even though his suit may terminate in favor of Ludmer. This was true even if he brought the suit with malice.

> "[A] mere suit, however malicious or unfounded, cannot be made the ground of an action for damages. If a person be not arrested or his property seized, it is unimportant how futile and unfounded the action may be; as the plaintiff, in consideration of law, is punished by the payment of costs."

Mayer v. Walter, 64 Pa. 283.

Although I believe that the statute (42 Pa. C.S.A. § 8531) eliminating the arrest or seizure requirement as an essential element of the cause of action was wise and long overdue, it, nonetheless, does not apply to the underlying suit in this case which was initiated prior to its enactment.

I would reverse the Order of the Superior Court and reinstate the Order of the lower court sustaining Nernberg's preliminary objections.

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

MARIO LUDMER,

Appellee

v.

MAURICE A. NERNBERG, Jr.,

Appellant

No. 46 W.D. Appeal Docket 1987

Appeal from Order of Superior Court dated February 26, 1986, and April 29, 1986, (Reargument denied) at No. 1275 Pittsburgh, 1984, which reversed the Order of the Court of Common Pleas of Allegheny County, Civil Division, dated September 20, 1984, at No. G.D. 84-11881 355 Pa. Super. 639 509 A.2d 1325 (1986)

ARGUED: March 7, 1988

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the SUPERIOR COURT OF PENNSYLVANIA be, and the same is, hereby AFFIRMED.

/S/ Irma T. Gardner
Irma T. Gardner
Deputy Prothonotary

DATED: February 3, 1989

APPENDIX E

MARIO LUDMER, OF

Appellant,

vs.

MAURICE A. NERNBERG, JR.

Appellee

No. 1275 Pittsburgh, 1984

IN THE SUPERIOR COURT OF PENNSYLVANIA

Appeal from the Order of the Court of Common Pleas, Civil Division, of Allegheny County, No. GD 84-11881.

BEFORE: ROWLEY, OLSZEWSKI, and DEL SOLE, JJ.

PER CURIAM: FILED: February 26, 1986

Order reversed.

Judge Del Sole files a Dissenting Memorandum.

MARIO LUDMER, IN THE SUPERIOR COURT OF PENNSYLVANIA

Appellant

vs.

MAURICE A. NERNBERG, JR.,

Appellee

No. 1275 Pittsburgh, 1984

Appeal from the Order of the Court of Common Pleas, Civil Division, of Allegheny County, No. GD 84-11881.

BEFORE: ROWLEY, OLSZEWSKI, and DEL SOLE, JJ.

MEMORANDUM:

On July 9, 1984, appellant filed a complaint against appellee alleging wrongful use of civil proceedings pursuant to 42 Pa.C.S. §8351. Appellee filed preliminary objections in the nature of a demurrer alleging that appellant failed to plead an arrest of the person or seizure of property and that because the complaint in the underlying action, which appellant contends was wrongfully brought, was filed prior to the effective date of 42 Pa.C.S. §8351, the statutory cause of action for wrongful use of civil process is

wrongful use of civil process is inapplicable. By order and opinion dated September 20, 1984, the trial court sustained the preliminary objections holding that appellant's cause of action had accrued when the complaint in the underlying action was filed (prior to the enactment of 42 Pa.C.S. §8351). Appellant has appealed from this order. We reverse.

Appellant contends that a cause of action for wrongful use of civil proceedings does not accrue until the underlying proceeding which gives rise to the claim has been terminated in favor of the defendant in the underlying action. The underlying claim in this case was not finally terminated in favor of appellant (defendant in underlying action) until the Supreme Court denied appellee's petition for allocatur on September 14, 1983. 42 Pa.C.S. §8351, creating a statutory cause of action for wrongful use of civil proceedings, became effective February 17, 1981 and was "applicable to causes of action accruing thereafter." 1980, December 19, P.L. 1296, No. 232, §2. Thus, appellant argues that when his cause of action accrued in September, 1983, the statutory cause of action, which abrogates the common law rule that a claimant must plead a seizure of person or property, applied. Therefore, it was error of law for the trial court to sustain appellee's preliminary objections on the basis that appellant failed to so plead.

Appellant's cause of action accrued when the underlying action was finally terminated in his favor. A cause of action accrues when the plaintiff is legally capable to maintain the action to a successful conclusion. Kapil v. Association of Pennsylvania State Colleges

and Facilities, 504 Pa. 92, 470 A.2d 482 (1983). Under both the common law cause of action for malicious prosecution and the statutory cause of action for wrongful use of civil proceedings, to maintain the action to a successful conclusion, the claimant must have obtained a favorable termination of the underlying action which was allegedly wrongfully instituted. Dietrich Industries, Inc. v. Abrams, 309 Pa.Super. 202, 455 A.2d 119 (1982); 42 Pa.C.S. §8351(A)(2). Therefore, until appellant had obtained a favorable termination of the underlying action, he had no cause of action. Because appellant received a final favorable termination of the underlying action on September 14, 1983, the statutory cause of action for wrongful use of civil process was applicable and appellant did not need to plead a seizure of his person or property. The trial court's application of this requirement to appellant and its consequent order sustaining appellee's preliminary objections were errors of law.

Appellee correctly argues that when an appellate court determines that a trial court sustained preliminary objections for an improper reason, the appellate court must nevertheless determine whether the averments of the complaint still state a cause of action. Shaffer v. Stewart, 326 Pa.Super. 135, 473 A.2d 1017 (1984). Accepting as true all well-pleaded facts in the complaint and inferences deducible therefrom, Id. at 141, 473 A.2d at 1020, we conclude that appellant has stated a cause of action under 42 Pa.C.S. §8351.

Appellant has averred that the prior proceedings were terminated in his favor. ¶15 Complaint at No. GD 84-11881. Appellant has also averred that the filing

of the complaint in the underlying action was grossly negligent and without probable cause. He avers that appellee intended solely to harass, defame, unduly burden, and maliciously injure him, and that appellee did not believe that his claim would be valid under the existing or developing law. ¶17(c-g) Complaint at No. GD 84-11881. Filing suit on an action which one does not believe is valid under existing or developing law does constitute acting without probable cause, as does suing merely to harass and injure another party. 42 Pa.C.S. §8352. Thus, appellant has averred facts sufficient for a statutory cause of action for wrongful use of civil process.

Appellee also argues that the appeal should be quashed or dismissed pursuant to Pa.R.A.P. 2101 for appellant's failure to serve appellee with a Designation of Contents of Reproduced Record, appellant's failure to include relevant docket entries in the reproduced record, and appellant's failure to attach to the notice of appeal a copy of the docket entry of the order from which the appeal was taken. Appellant's omissions are not so substantial as to impair our ability to conduct meaningful appellate review and appellee has not been prejudiced by the defects. Estate of Vittorio, 290 Pa.Super. 329, 331, n.1, 434 A.2d 777, 778, n.1 (1981). Therefore, we will neither quash nor dismiss the appeal.

Order sustaining appellee's preliminary objections to appellant's complaint is reversed.

Judge Del Sole files a Dissenting Memorandum.

MARIO LUDMER,

Appellant

vs.

MAURICE A. NERNBERG, JR.,

Appellee

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1275 Pittsburgh, 1984

Appeal from the Order of the Court of Common Pleas, Civil Division, of Allegheny County, No. GD 84-11881.

BEFORE: ROWLEY, OLSZEWSKI, and DEL SOLE, JJ.

DISSENTING MEMORANDUM BY DEL SOLE, J.:

I respectfully dissent. Between March 5, 1979 and February 17, 1981, it was impossible to maintain a cause of action against an individual for malicious use of process unless the underlying action involved an arrest of the person or seizure of property.[1] Simply stated, the

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1 Dietrich Industuries, Inc., v. Abrams, 309 Pa. Super, 202, 455 A.2d 119 (1982).

underlying use of process was not malicious without an arrest of the person or seizure of property.

42 Pa.C.S.A. § 8351 et seq. effective February 17, 1981 changed this aspect of the substantive law. This statutory cause of action for Wrongful Use of Civil Proceedings abrogated the necessity of a claimant pleading an arrest of the person or seizure of property.[2] In other words, an underlying use of civil proceedings could from that date on be found wrongful

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2

42 Pa. C.S.A. § 8351 provides:
Wrongful use of civil proceedings

(a) Elements of action.-A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings:

(1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and

(2) The proceedings have terminated in favor of the person against whom they are brought.

(b) Arrest or seizure of person or property not required. -The arrest or seizure of the person or property of the plaintiff shall not be a necessary element for an action brought pursuant to this subchapter. 1980, Dec., 19, P.L. 1296, No. 232, § 1, effective in 60 days.

without an arrest of the person or seizure of property occurring. Thus, what previously was not malicious could now be wrongful.

The rationale of the majority places the Appellee in the untenable position of facing present liability for instituting past procedures which were not actionable at the time they were initiated. Appellee filed the underlying complaint on March 5, 1979. There is no allegation that an arrest of Appellant or seizure of Appellant's property occurred as a result. Appellee in planning his affairs could safely rest assured that he had done nothing which could subject him to subsequent liability for malicious use of process under existing law. Approximately two years after the underlying complaint was filed, the previously discussed statutory change in the substantive law occurred on February 17, 1981. The underlying action finally terminated in Appellants favor on September 14, 1983, the date the Pennsylvania Supreme Court denied the petition for Allocatur.

The majority emphasizes the date upon which the underlying action terminated. It is said that, "(b)ecause appellant received a final favorable termination of the underlying action on September 14, 1983, the statutory cause of action for wrongful use of civil process was applicable and appellant did not need to plead a seizure of his person or property." (Majority Memorandum at 2-3). While I agree that the within cause of action could not be initiated by Appellant until there was a favorable termination of the underlying cause of action, emphasis upon termination should not be allowed to detract from the necessity for

equal emphasis upon careful examination of the initiation of the underlying cause of action. The gravamen of the tort of malicious use of process must be defined by the law as of the date the underlying complaint is filed. It matters not that the underlying action terminated favorably to Appellant when the underlying use of process could not have been malicious under the law at the time it was initiated.

I would therefore affirm the order of the trial court sustaining Appellees Preliminary Objections and dismissing the complaint.

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

MARIO LUDMER,

Appellant

v. No. 1275 Pittsburgh, 1984

MAURICE A. NERNBERG, JR.

ORDER

AND NOW, this 26th day of February, 1986, it is ordered as follows:

_____ Order affirmed.

__X__ Order reversed.

_____ Judgment affirmed.

_____ Judgment of Sentence affirmed.

_____ Judgment of Sentence reversed.

_____ Order vacated and lower court directed to proceed in accordance with opinion filed herewith.

_____ Order modified as set forth in opinion filed herewith.

_____ Costs to be taxed as provided by Chapter 27 of the Pa. R.A.P.

_____ Costs to be taxed as provided in opinion filed herewith.

_____ Appeal quashed.

BY THE COURT

/S/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

APPENDIX F

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

MARIO LUDMER,	CIVIL DIVISION
Plaintiff,	No. GD84-11881
vs.	OPINION
MAURICE A. NERNBERG, JR., Defendant.	Filed By: MCGOWAN, J.

COUNSEL OF RECORD:

For the Plaintiff:
Seymour A. Sikov, Esquire
1400 Lawyers Building
Pittsburgh, PA 15219

For the Defendant:
W. Thomas Laffey, Jr., Esquire
301 Smithfield Street
Pittsburgh, PA 15222

Copies sent to counsel of record.

OPINION

McGOWAN, J. JANUARY 11, 1985

The within case came before the Court by way of Preliminary Objections in the nature of a demurrer and in the alternative, a Motion to Strike filed by the Defendant, Maurice A. Nernberg.

Plaintiff is Mario Ludmer, who filed suit against the Defendant alleging a cause of action for wrongful use of civil proceedings pursuant to 42 Pa. C.S.A. §8351.

The underlying suit which gave rise to the Plaintiff's action for wrongful use of civil proceedings was commenced in March of 1979. The statutory authority, 42 Pa. C.S.A. §8351, which the Plaintiff relied on became effective February 19, 1981.

Prior to the effective date of the passage of Act of December 19, 1980, P.L. 1296, No. 232, Section 1, 42 Pa. C.S.A. 8351, the law in Pennsylvania required a Plaintiff to plead and prove an arrest of the person or seizure of his property in order to state a cause of action for either malicious use of process or abuse of process. Triester v. 191 Tenants' Association, 273 Pa. Super. 377, 417 A.2d 698 (1979).

The Act of December 19th, 1980, abrogated the common law requirement for a seizure of person or property in actions for malicious use of process. However, the Plaintiff's cause of action for wrongful use of civil process accrued with the initiation of the underlying suit. Since the suit which gave rise to the Plaintiff's instant action, was commenced

in 1979, this Plaintiff would be required to plead and prove a seizure of his person or property in order to state a cause of action for malicious use of process or abuse of process.

The review of the pleadings revealed no indication of any claim as to seizure of Plaintiff's property or person. Therefore, as a matter of law, Plaintiff failed to state a cause of action for malicious use of process or abuse of process. Ace v. Argonaut Insurance Company, 307 Pa. Super. 1200, 452 A.2d 1384 (1982).

Through all of this, the Plaintiff rejoins that the cause of action does not accrue until the prior suit is terminated in favor of the instant Plaintiff, and this did not finally occur until the Defendant's, the prior Plaintiff, petition for allocatur was denied by the Supreme Court on September 14, 1983.

When Nernberg commenced his prior suit in March of 1979, the settled case law in Pennsylvania required a seizure of person or property. Plaintiff now asks retroactive application of the statute, effective two years later, changing the case law. The cause of action accrued with the institution of the alleged prior wrongful suit, as this was the wrong done to the Plaintiff, and the law at that time is controlling. The requirement that the prior matters be terminated in favor of the present Plaintiff is only a necessary precondition to the filing of the action.

As the Court granted the Defendant's Preliminary Objection in the nature of a demurrer, there was no need to reach the Motion to Strike.

APPENDIX G

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

MARIO LUDMER	NO. 261 W.D. ALLOCATUR DKT. 1994
v.	
MAURICE A. NERNBERG, JR.,	Petition for Reconsider-ation from
PETITIONER	the Superior Court

ORDER

PER CURIAM:

AND NOW, this 24th day of October, 1995, the Petition for Reconsideration of Denial of Petition for Allowance of Appeal is denied. Application to Amend Application for Reconsideration denied as moot. Second Application to Amend Application for Reconsideration denied as moot.

Mr. Justice Montemuro is sitting by designation.

A True Copy Irma T. Gardner
as of: October 24, 1995
Test: /S/ Irma T. Gardner
Deputy Prothonotary
Supreme Court of
Pennsylvania

APPENDIX H

IN THE SUPREME COURT OF PENNSYLVANIA

No.

MARIO LUDMER,

Respondent,

-vs-

MAURICE A. NERNBERG, JR. and FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Petitioners.

EMERGENCY APPLICATION FOR SPECIAL RELIEF

Appeal from the Judgment of the Court of Common Pleas of Allegheny County, Civil Division, entered on October 31, 1995 at GD84-11881, and the Superior Court Order denying Emergency Relief, entered on November 3, 1995 at No. 2025 Pittsburgh 1995

Maurice A. Nernberg
NERNBERG & COONEY
301 Smithfield Street
Pittsburgh, PA 15222-2277
(412) 232-0334

Pa. I.D. No. 00127
Firm No. 331
Attorneys for Petitioners

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EMERGENCY APPLICATION FOR SPECIAL RELIEF

AND NOW, come Petitioners, Maurice A. Nernberg and Fidelity and Deposit Company of Maryland, by and through their attorneys, Nernberg & Cooney and file the within Emergency Application for Special Relief:

1. This Court has jurisdiction over this matter, because the order from which the appeal is taken is a final order, of a mandatory injunctive nature and because this court has supervisory powers over the Superior Court and Common Pleas Court.

2. Your Petitioners appeal from the Order of Court dated October 31, 1995 in the Court of Common Pleas of Allegheny County, a receipted copy of which is attached hereto as Exhibit A, and an Order of the Superior Court which denied Emergency Relief, dated November 3, 1995, a copy of which is appended hereto as Exhibit B.

3. Your Petitioner, Nernberg, was the Defendant and verdict loser in the action at GD84-11881. Petitioner Fidelity was the surety for the supersedeas bond, the subject of this appeal.

4. The judgment was for seventy-five thousand dollars ($75,000.00) and the bond was-posted at one hundred and twenty percent (120%) of the judgment pursuant to the automatic supersedeas provisions of Pa. R.A.P. 1731. A copy of the receipt from the Prothonotary and the bond as filed with the Prothonotary is attached as Exhibit C.

5. On October 24, 1995, the Supreme Court of Pennsylvania denied Nernberg's Petition for Reconsideration of Denial of Petition for Allowance of Appeal.

6. It was assumed that the Prothonotary of the Supreme Court held the record pursuant to Pa. R.A.P. 3812. That Rule requires the Prothonotary of the Supreme Court, upon receipt of a petition for review, to notify the Prothonotary of the Superior Court who is then to deliver the record within one day. With that assumption, Nernberg notified the Prothonotary of the Supreme Court of his intention to petition to the United States Supreme Court for a Writ of Certiorari.[1] It was at this time that he discovered that the Supreme and Superior Courts did not comply with Pa. R.A.P.3812. The record was never delivered to the Supreme Court, but had been returned to the lower court. This breakdown in procedure effectively remanded jurisdiction to the Common Pleas Court before the time expired for consideration by the United States Supreme Court.

7. Mr. Sikov presented the Order, without any kind of Petition or Application, nor any statement of verification of the facts, to Judge Bigley and the Order was signed on October 31, 1995 and filed at 9:50 a.m.

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[1] There are two federal issues involved in this case. One, ex post facto application of the statute under which the Defendant was sued, and two, due process. Both of these issues are discussed in dissenting opinions before the Supreme Court and Superior Court. Thus, your Petitioner wrote to the Prothonotary of the Supreme Court on October 27, 1995, to retain the record so that a Petition could be filed.

8. Attached hereto, as Exhibit D, is a "transcript" of the presentation of the Order.

9. As is evident from the transcript, there was no sworn testimony or verified factual statement to support the sanction order issued by Judge Bigley. As also may be evident, by the first statement contained in the transcript (page 2):

> "THE COURT: All right. Mr. Sikov, you have an Order --"

that the Court must have been aware of the nature of what was to transpire, indicating that there may have been some ex parte communication in advance of the presentation.

10. A review of the transcript evidences a lack of regard or knowledge for the rules of procedure or due process (page 2, line 6):

> Yes. I have presented to the Court a request to -- I have actually presented an Order of court issued pursuant to rule of Appellate Procedure 1734 (c).
>
> . . .
>
> I invite the Court's attention to the particular section of the Rule of Appellate Procedure. It does not require any notice to anyone. It just **required an application.** (emphasis added, page 3).

11. In fact, had either the Court or Mr. Sikov actually reviewed Pa. R.A.P. 1734 (c), it would have been obvious that notice was required. Rule 1734 (c) is as

follows:

> (c) Liability of Sureties. If security is given under this chapter in the form of a bond, stipulation or other undertaking in the nature of a bond, with one or more sureties, each surety submits himself to the jurisdiction of the lower court and irrevocably appoints the clerk of the lower court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. This liability may be enforced on application in the lower court with out the necessity of an independent action. The application and such notice of the application as the lower court prescribes may be served on the clerk of the lower court, who shall forthwith mail copies to the sureties if their addresses are known. (emphasis added).

12. The Order violates the supersedeas rules, due process, and the Rules of this Court for the following reasons:

A. Ex parte discussion may have taken place between the Court and Mr. Sikov before the order was presented.

B. It is also obvious Rule 1734 (c) does not eliminate the requirement of an application or of notice. It defines such. The term "application" is defined in Pa. R.A.P. 123 as follows:

(a) **Contents of Applications for Relief.** Unless another form is elsewhere prescribed by these rules, an application for an order other relief shall be made by filing a written application for such order or relief proof of service on all other parties. (emphasis added).

There was no "application" the term is defined as a writing. Both Mr. Sikov and Judge Bigley should have been aware.

C. This case was not assigned to Judge Bigley. While Judge Bigley heard the matter as trial judge, Allegheny County Court Rule 249 provides that all motions are to be presented to the Judge sitting in the Motions room. At this time, the Motions Judge was Judge Penkower.

D. Allegheny County Court Rule 249 provides that "except in cases of emergency or waiver of consent by all parties, at least ten (10) days written notice shall be required."

E. The order is in the case of Ludmer v. Nernberg, but it applies to Fidelity and Deposit Company of Maryland, the surety. Neither the Clerk, Nernberg nor Fidelity were given proper notice. What is more disconcerting, is that Judge Bigley did not either consider the problem or seek assurance that a proper notice was given.

F. Although Maurice A. Nernberg has entered his appearance in the

Supreme Court, James R. Cooney and Reginald Belden have their appearances in the lower court. No notice of any kind was given Mr. Cooney or Mr. Belden.

G. The bond was ninety thousand dollars ($90, 000. 00) and the amount -claimed due by Mr. Sikov, was less than ninety thousand dollars ($90,000.00). Thus, there was no emergency. Even if interest ran at twelve dollars and fifty cents ($12.50) per day, as proposed by Mr. Sikov, only one hundred twenty-five dollars. ($125.00) in interest would have accrued if a Motion was presented with a ten (10) day notice, which would not have jeopardized satisfaction.

13. The Order itself is violative of the laws of the Commonwealth of Pennsylvania, of which Judge Bigley should have been aware. If not aware, he would have been informed if he followed the minimum due process requirements of notice and an opportunity to be heard:

A. The Order requires payment and interest within 3 days. While Pa. R.A.P. 1734 grants the Court jurisdiction over the surety, it does not give the Court equity powers to penalize nonpayment. . Rather, the Court can order judgment against the surety. While the Rule dispenses with the need to institute a new proceeding, it does not obviate the need for due process nor abrogate normal

legal principles.

B. The Court ordered sanctions for non-payment by awarding interest at the prime rate plus three percent (3%). There is no provision in Pennsylvania law for punitive interest rates. Interest, by law, is at six percent (6%) annually.

C. The Order provides for punitive damages. Pennsylvania courts have recently held that the bad faith provision for punitive damages applies only against an insurer. Punitive damages are not appropriate as to a breach of contract claim.

D. The amount of interest claimed is incorrect. The order provides for payment of interest at twelve dollars and fifty cents ($12.50) per day, when interest at six percent (6%) annually would be twelve dollars and thirty-two cents ($12.32) per day.

E. Judge Bigley's order is punitive in nature. It does not permit time for an appeal and consideration of the issues. If it were a simple judgment, it could be addressed. Its timing was such as to prevent appeal.

14. In addition to lacking notice and an opportunity to be heard, the procedure that took place in the entry of the order also violated Petitioner's civil rights for other reasons set forth herein:

A. Although the Order requires payment of the judgment, there

is no provision for protection of the Petitioners. The Respondent is not required to satisfy the judgment, nor is there a provision to release the bond or any portion of it. In short, the payment will be made, but the Court imposed no duty on the Respondent to do anything. Petitioners are unprotected.

B. If Respondent were to comply with the laws of this Commonwealth and issue execution upon a judgment, Petitioners could insist upon satisfaction as a condition of payment. Here, the Court has ordered payment without satisfaction or protection to the Petitioners.

C. There is no provision in Pennsylvania law for a "partial" execution. While it is true that the Respondent is entitled to costs, the Respondent is not entitled to divide the judgment. Once paid, the Respondent is paid. Here the Order is to make a <u>partial payment of the amount claimed</u>. Payment is of the principal and interest, leaving the judgment in tact for the future claim for costs.

D. Conversely, for the Court to order payment and satisfaction could affect the appeal to the United States Supreme Court by making the issue moot.

15. The last issue has never been addressed in Pennsylvania:

Whether a supersedeas bond

applies to an appeal beyond the state court.

We believe that a Pennsylvania court (and the federal courts) would hold that the bond would act as a supersedeas until the final disposition of the appeal. See Pa. R.A.P. 1734 (b) . Normally, this would not be an issue, because the issue should be in the appropriate appellate court pending the expiration of the time for the next appeal. This case is unique in that the appellate courts did not follow their own rules.

16. Because of the severity of the punishment for violation of the order issued, the surety has sent a check to-the Respondent. Since the surety is a guarantor and the payment is made on behalf of Nernberg, Nernberg objected to the payment, but considering the severity of the punishment for violation of the order, cannot prevent the surety from making payment.

17. Judge Bigley's actions should be reviewed and may require his removal from the case.

WHEREFORE, it is prayed this Honorable Court order as follows:

1. Vacate the Order of October 31, 1995 and reverse the Superior Court denial of the Motion for Emergency Motion for Special Relief as being unconstitutionally granted and in violation of due process and the Petitioners' civil rights under the laws of this Commonwealth and of the United States.

2. Direct the recusal of Judge Bigley and certify the matter for inquiry concerning possible ex parte communications between Mr. Sikov and Judge Bigley.

3. Order that any funds transmitted by the Petitioners shall be deposited into the office of the Prothonotary of Allegheny County, forthwith; the judgment shall be marked secured, with the supersedeas in effect, but the cash will be substituted for the bond. The supersedeas will remain in effect for ninety (90) days from the date of the denial of the reconsideration, and thereafter, if a petition for certiorari is filed before the Supreme Court of the United States, until a decision of that Court.

4. That as a result of the Order and Fidelity's compliance therewith, Respondent is limited in its claim to the ninety thousand dollars ($90,000.00) to be deposited.

   See Union National Bank of Pittsburgh v. Ciongoli, 407 Pa. Super. 171, 595 A.2d 179 (1991).

5. Direct the lower court to award counsel fees pursuant to 42 Pa. C.S.A. §2503.

Respectfully submitted,

NERNBERG & COONEY

By: /S/ Maurice A. Nernberg
Maurice A. Nernberg
Attorneys for Petitioners
(Pa. I.D. No. 00127)

301 Smithfield Street
Pittsburgh, PA 15222-2277
(412) 232-0334
Firm I.D. No. 331

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MARIO LUDMER,

Plaintiff,

vs.

MAURICE A NERNBERG, JR.,

Defendant.

CIVIL DIVISION

No. G.D. 84-11881

ORDER OF COURT ISSUED PURSUANT TO APPELLATE PROCEDURE 1734(c)

Filed on Behalf of Plaintiff

Counsel of Record for this Party:

Seymour A. Sikov, Esquire
Pa. I.D. 01002

Sikov and Love, P.A.
Firm #267

1400 Lawyers Building
Pittsburgh, PA 15219
412/261-4202

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MARIO LUDMER, CIVIL DIVISION

Plaintiff, No. G.D. 84-11881

vs.

MAURICE A. NERNBERG, JR.,

Defendant.

ORDER OF COURT ISSUED PURSUANT TO RULE OF APPELLATE PROCEDURE 1734(c)

AND NOW, to wit, this 31st day of October, 1995, upon Motion of Seymour A. Sikov, Esquire of the law firm of Sikov and Love, P.A., counsel of record for the Plaintiff Mario Ludmer, the Court having had exhibited to it pertinent Orders of Court entered by the Superior Court of Pennsylvania affirming the denial of Defendant's Motion for Post-Trial Relief and of the Supreme Court of Pennsylvania denying Defendant's Petition for Allowance of Appeal as well as denying Defendant's Application for Reconsideration of the denial by the Supreme Court of Defendant's Petition for Allowance of Appeal, and the court having demonstrated to it that, pursuant to the applicable law of the Commonwealth of Pennsylvania, a Surety

by Fidelity and Deposit Company of Maryland in the amount of $90,000.00 as part of Defendant's Appeal to the Superior Court of Pennsylvania, and the Court having been advised that as of October 28, 1995 the amount due the Plaintiff on the verdict rendered in favor of the Plaintiff on November 20, 1992 to include interest to October 28, 1995 totaled $88,212.50, pursuant to Rule 1734(c) of the Rules of Appellate Procedure of the Commonwealth of Pennsylvania, and after due and deliberate consideration, it is hereby:

ORDERED, ADJUDGED and DECREED that the Fidelity and Deposit Company of Maryland be and is hereby found liable to the Plaintiff to pay the verdict and interest to the date payment is made, and said Fidelity and Deposit Company of Maryland is hereby ordered to pay forthwith to the Plaintiff and Plaintiff's counsel, Sikov and Love, P.A., the sum of $88,212.50 as of October 28, 1995 plus the sum of $12.50 from that date until payment is actually received by counsel for the Plaintiff.

Further, it is ORDERED, ADJUDGED and DECREED that said Surety is liable for the costs as same may be taxed by the Prothonotary of this Court subsequent to the entering of this Order.

Lastly, it is ORDERED and DECREED that, inasmuch as all avenues of appeal within the Commonwealth of Pennsylvania have now been exhausted by the Defendant, if the Fidelity and Deposit Company of Maryland, as surety, fails to pay the verdict and interest as hereinbefore set forth within three (3) days from the date of this Order it may be subject, in consequence of it's bad faith, to pay Plaintiff interest at the rate of prime

plus three (3%) percent, punitive damages, Court costs and attorney's fees.

BY THE COURT:

/S/ Bigley J.

November 3, 1995

Maurice Nernberg, Esquire
Nernberg & Cooney
301 Smithfield Street
Pittsburgh PA 15222-2277

IN RE: Mario Ludmer v. Maurice Nernberg, Jr.
No. 2025 Pittsburgh 1995

Dear Mr. Nernberg:

The Court has entered the following Order on your Motion for Special Relief in the above-captioned matter:

"ORDER OF COURT

Upon consideration of the Emergency Motion for Special Relief, the motion is denied.

DATE: November 3, 1995

PER CURIAM"

Very truly yours,

/S/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

ERV: mlh
cc: Seymour Sikov, Esquire
Honorable Gerard Bigley

OFFICE OF THE PROTHONOTARY

ALLEGHENY COUNTY 33212

CASHIER'S RECEIPT

NO. GD84-11881

6/15 1993

LUDMER

VS.

NERNBERG

CIVIL ACTION	$	
DSB		
EQUITY		
EXECUTION		
FIRST FILING		
JOINDER		
JUDGMENT		
JURY TRIAL		
LIEN		
NON-JURY (REG)(CERT)		
REVIVAL (AGREE)(WRIT)		
TRANSCRIPT		
BOND	10	00
TOTAL	$10	00
DEPUTY		

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MARIO LUDMER, CIVIL DIVISION

Plaintiff, No. GD84-11881

V.

MAURICE A. NERNBERG,

Defendant.

SUPERSEDEAS BOND PURSUANT TO Pa. R.A.P. 1731

Filed on Behalf of: MAURICE A. NERNBERG, JR., DEFENDANT

Counsel of record for this party: James R. Cooney

Pa. I.D. No. 32706

NERNBERG & COONEY
301 Smithfield Street
Pittsburgh,PA 15222
(412) 232-0334

BOND APPROVED

June 15, 1993
Michael F. Coyne
Prothonotary
By/S/ Donald Siulborski
Deputy

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

Mario Ludmer,
Plaintiff CIVIL DIVISION

V. GD84-11881

Maurice A. Nernberg, Jr.,
Defendant.

SUPERSEDEAS BOND

Defendants/Appellants-Maurice A. Nernberg., Jr. having appealed from a judgment of the Court of Common Pleas of Allegheny County, entered in the above-captioned matter an 20th day of November,1992, based on an Order dated June 8,1993, and having procured the execution of this instrument for the purpose of complying with the Pennsylvania Rules of Appellate Procedure, the undersigned Surety acknowledges itself bound and indebted to the Commonwealth or Pennsylvania, for the use of the persons or parties entitled thereto, in the sum of Ninety Thousand and no/100 ------ $90,000.00, to be paid as required by law.

The condition of this obligation is that if the Defendants/Appellants shall satisfy the above identified judgment, if it is affirmed or if for any reason the appeal is dismissed, or shall satisfy any modification of the judgment, and in either case shall pay all costs, interest

and damage for delay that may be awarded, this obligation shall be void; but otherwise it shall remain in force.

Dated: June 15, 1993

Fidelity and Deposit Company of Maryland

/S/ Nancy Zbonzy
Witness as to Surety

BY:/S/ Kenneth F.Chester
Kenneth F. Chester, Attorney-in-fact

Power of Attorney

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

KNOW ALL MEN BY THESE PRESENTS: That the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation of the State of Maryland, by C. M. Pecot, Jr., Vice-President and C. W. ROBBINS, Assistant Secretary, in pursuance of authority granted by Article VI. Section 2 of the By-Laws of said Company, which are set, forth on the reverse side hereof and are hereby certified to be in full force and effect on the date hereof, does hereby nominate, constitute and appoint Kenneth F. Chester, Sherron D. Prim, Rozanne Kadid, Marcella Haponski, Nancy Zbozey, Paul E. Davis, Mary Beth Pronko and Elizabeth Poole, all of Pittsburgh, Pennsylvania, EACH its true and lawful Agent and Attorney-in-fact, to make, execute, seal and deliver, for and on its behalf as surety, and as its act and deed any and all bonds and undertakings. And the execution of such bonds or undertakings in pursuance of these presents shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Md., in their own proper persons. This power of attorney revokes that issued on behalf of kenneth F. Chester, etal dated, August 19, 1991.

The said Assistant Secretary does hereby certify that the extract set forth on the reverse side hereof is a true copy

of Article VI. Section 2. of the By-Laws of said Company, and is now in force.

IN WITNESS WHEREOF, the said Vice-President and Assistant Secretary have hereunto subscribed their names and affixed the Corporate Seal of the said FIDELITY AND DEPOSIT COMPANY OF MARYLAND, this 28th day of September, A.D. 1992.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

ATTEST:

/S/ C. W. Robbins
Assistant Secretary

By/S/ C.M. Pecot,Jr.
Vice-President

State of Maryland)
)
County of Baltimore)

On this 28th day of September, A.D. 1992, before the subscriber, a Notary Public of the State of Maryland, duly commissioned and qualified, came C. M. PECOT, JR., Vice-President and C. W. ROBBINS, Assistant Secretary of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, to me personally known to be the individuals and officers described in and who executed the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officer of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signatures are their signatures as such officers were

duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Official Seal the day and year first above written.

/S/ Carol J. Fader
CAROL J. FADER Notary Public
My Commission Expires August 1, 1996

CERTIFICATE

I, the undersigned, Assistant Secretary of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, do hereby certify that the original Power of Attorney of which the foregoing is a full, true and correct copy, is in full force and effect on the date of this certificate; and I do further certify that the Vice-President who executed the said Power of Attorney was one f the additional Vice-Presidents specially authorized by the Board of Directors to appoint any Attorney-in-fact as provided in Article VI. Section 2. of the By-Laws of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

This Certificate may be signed by facsimile under and by authority of the following resolution of the Board of Directors of FIDELITY AND DEPOSIT COMPANY OF MARYLAND at a meeting duly called and held on the 16th day of July, 1969.

RESOLVED: "That the facsimile or mechanically reproduced signature of any Assistant Secretary of the Company,

whether made heretofore or hereafter, wherever appearing upon a certified copy of any power of attorney issued by the Company, shall be valid and binding upon the Company with the same force and effect as though manually affixed.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of the said Company, this 15th day of June, 1993.

/S/ J. Gregory Hamilton
Assistant Secretary

CERTIFICATE OF SERVICE

I, JAMES R. COONEY, hereby certify that a true and correct copy of the within Supersedeas Bond Pursuant to Pa. R.A.P. 1731 was served, this date, by first-class, postage prepaid mail, addressed as follows:

Seymour A. Sikov, Esquire
1400 Lawyers Building
Pittsburgh, PA 15219

Date: 6-15-93

/S/ James R. Cooney
James R. Cooney

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MARIO LUDMER,	CIVIL DIVISION
Plaintiff,	No. FD 84-11881
Vs	REQUEST FOR COURT ORDER
MAURICE A. NERNBERG, JR.,	Date: October 31, 1995
Defendant.	Filed by: Cheryl A. Chorba Official Court Reporter

BEFORE:

HON. GERARD M. BIGLEY

COUNSEL OF RECORD:

For the Plaintiff:

Seymour A. Sikov, Esq.
Sikov & Love, P.A.
Lawyers Building, 14th Floor
Pittsburgh, PA 15219

COPY

(Tuesday, October 31, 1995)

THE COURT: All right. Mr. Sikov, you have an Order --

MR. SIKOV: Yes. I have presented to the Court a request to -- I have actually presented an Order of Court issued pursuant to Rule of Appellate Procedure 1734 (c).

The Court is well aware of this matter having been the trial Court in the underlying matter.

The Defendant in this matter has filed appeals to the Superior Court which affirm the denial of the Motion for Post-trial Relief; filed the Petition for Allowance of Appeal to the Supreme Court, that was denied; filed an Application for Reconsideration, a First and Second Amendment, that was denied.

In accordance with the bond that was posted by Fidelity and Deposit Company of Maryland, and in accordance with the law, I notified them and requested immediate payment.

By letter dated October 30, 1995, which they sent to me by facsimile in response to my letter demanding payment of the bond, they stated the following.

"It was our understanding Rule 1734 (C) of the Pennsylvania Rules of Appellate Procedure requires an application requesting payment on the bond be filed in the lower Court without the necessity of an independent action.

"Further, the application, such notice of application as the lower Court prescribed may be served on Clerk of lower

Court who shall forthwith mail copies to sureties."

I invite the Court's attention to the particular section of the Rule of Appellate Procedure. It does not require any notice to anyone. It just required an application.

However, being overly cautious, yesterday I called the Offices of Attorney Nernberg at 4:45, advised him I was presenting this this morning. Actually, it talks about an application. I spoke with personnel in the Prothonotary's Office of the Office of the Civil Division of this Court who advised that some notice from this Court as the trial Court would be necessary. They suggested an order.

This is the reason that I presented this to the Court. The Defendant in this case has more than exhausted all of his avenues of approach.

I spoke with the Prothonotary of the Supreme Court yesterday. That record was never lodged there. It was returned to this Court by the Superior Court of Pennsylvania, thus vesting jurisdiction in Your Honor as the trial Court to issue the order that I have requested.

The provisions of the Order are in accordance with the Rule, Your Honor, and the last paragraph of the Order, in the event the Court has a question concerning it, has to do with 42 PA C.S.A. 2503 which talks about frivolous actions and delaying tactics. Based upon what has happened over some 11 years when this matter has been pending before this Court, out of an abundance of caution I added that paragraph.

Bonding company seems to indicate they are prepared to make payment upon being notified by the Prothonotary of the

Civil Division of this Court that this Court has entered an appropriate Order.

THE COURT: All right. The Court will sign your Order. Best of luck in collecting it.

MR. SIKOV: There is a bond of sufficient amount.

Is the Court returning to me the copies of the others?

THE COURT: Yes.

MR. SIKOV: Thank you very much.

THE COURT: Give a copy, the unsigned copy to my secretary.

MR. SIKOV: The other signed --

THE COURT: The unsigned copy.

MR. SIKOV: Oh, the unsigned copy. I have a copy for the Court. Thank you, Your Honor.

THE COURT: Thank you.

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY,

CERTIFICATE OF REPORTER

I, Cheryl A. Chorba, do hereby certify that the evidence and proceedings are contained fully and accurately in the machine shorthand notes taken by me at the trial of the within cause, and that the same were transcribed under my supervision and direction, and that this is a correct transcript of the same.

_____
Cheryl A. Chorba
Official Court Reporter
Court of Common Pleas

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

_____
Judge

CERTIFICATE OF SERVICE

I, MAURICE A. NERNBERG, JR., hereby certify that a true and correct copy of the within Emergency Motion for Special Relief was served upon all parties to the within matter, this date, by first class mail, addressed as follows:

Seymour A. Sikov, Esquire
SIKOV & LOVE, P.A.
Lawyers Building, Fourteenth Floor
Pittsburgh, PA 15219

Date: November 20, 1995

/S/ Maurice A. Nernberg, Jr.
Maurice A. Nernberg, Jr.

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2025 PGH 1995

MARIO LUDMER,

Respondent,

-vs-

MAURICE A. NERNBERG, JR. and
FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

Petitioners.

ORDER OF COURT

AND NOW, this day of , 1995, it is hereby ORDERED and DECREED that Petitioners,' Emergency Motion for Special Relief is hereby granted as follows:

1. The Order entered on October 31, 1995 by the Honorable Gerard M. Bigley is vacated as being unconstitutionally granted and in violation of due process and Petitioners' civil rights.

2. Judge Bigley is hereby directed to recuse himself from this case and the matter of ex parte communications between Mr. Sikov and Judge Bigley is hereby certified for inquiry.

3. The judgment shall be marked secured upon the deposit of funds transmitted by the Petitioners into the office of the Prothonotary of Allegheny County with the supersedeas bond still in effect, but with cash substituted for the bond, for ninety (90) days from the date of the denial of the reconsideration and/or if a petition for certiorari is filed before the United States Supreme Court.

4. Respondent is limited in its claim to ninety thousand dollars ($90,000.00) to be deposited.

5. The lower court is hereby directed to award counsel fees in favor of Petitioner and against Respondent pursuant to 42 Pa. C.S.A. §2503.

BY THE COURT:

_____J.

APPENDIX I

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

MARIO LUDMER, No. 137 Western District Miscellaneous Docket 1995

Respondent

Emergency Application for Special Relief

V.

MAURICE A. NERNBERG, JR, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Petitioners

O R D E R

PER CURIAM:

AND NOW, this 1st day of December, 1995, the Emergency Application for Special Relief is DENIED. Respondent's request for reasonable counsel fees in response to said Application is GRANTED.

Mr. Justice Montemuro participates by designation as a senior judge as provided by Rule of Judicial Administration 701 (f).

A True Copy Irma T. Gardner
as of: December 1, 1995
Test: /s/Irma T. Gardner
Deputy Prothonotary
Supreme Court of
Pennsylvania

APPENDIX J

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

MARIO LUDMER, No. 137 Western District
Misc. Dkt. 1995

Respondent

Emergency Application
for Special Relief

V.

MAURICE A. NERNBERG,
JR., and FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

Petitioners

O R D E R

PER CURIAM

AND NOW, this 4th day of December, 1995, the Order entered December 1st, 1995, has been amended to read as follows:

AND NOW, this 4th day of December, 1995, the Emergency Application for Special Relief is DENIED. Respondent's request for reasonable counsel fees in response to said Application is granted. The matter is remanded to the Trial Court for determination of the amount of counsel fees to be awarded Respondent.

Mr. Justice Montemuro participates by designation as a senior judge as provided by Rule of Judicial Administration 701(f).

A True Copy Irma T. Gardner
as of: December 4, 1995
Test: /s/Irma T. Gardner
Deputy Prothonotary
Supreme Court of Pennsylvania

5176\5176B1/MAN/lrm/042596

(2)

No: 95-1448

Supreme Court, U.S.
FILED
MAY 3 1996
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

MARIO LUDMER,

Respondent,

vs.

MAURICE A. NERNBERG, JR.,

Petitioner.

REPLY BRIEF PURSUANT TO RULE 15 A

Maurice A. Nernberg
MAURICE A. NERNBERG &
ASSOCIATES
301 Smithfield Street
Pittsburgh, PA 15222
(412) 232-0334

Counsel of Record for
Petitioner

17 pp

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Conclusion.....2

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Complaint.....1a

Official Docket Entries.....10a

REPLY BRIEF PURSUANT TO RULE 15 A

This response is pursuant to Rule 15 A.

The statements contained in the Respondent's Brief are simply not true.

The Wrongful Use statute became effective on February 19, 1981. As may be noted by the Docket Entries Appendix, p. 10a, the only activity that took place after the effective date was the granting of Defendant's motion for summary judgment (which had been filed prior to the effective date). The only activity of the Plaintiff following the effective date was the appeal from the summary judgment.

An appeal cannot be the basis of a Wrongful Use action, Rosen v. American Bank of Rolla, 42 Pa.Super.376, 627 A2d. 190 (1993).

Also, as may be evidenced by the complaint, attached as Appendix, p. 1a, there is no distinction made between activities that took place before the effective date of the statute and thereafter. The record in the case evidences that the trial court made no such distinction. Neither did the appellate courts, either in the first appeal which resulted in reinstating the action against the Petitioner, nor in the second, after the judgment was rendered.

CONCLUSION

In conclusion, the Petitioner respectfully requests this Honorable Court support Petitioner's Reply Brief and grant the Petition for Writ of Certiorari, thereby denying the Brief of Respondent, Mario Ludmer, in Opposition to Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

MAURICE A. NERNBERG & ASSOCIATES

By: _____

Maurice A. Nernberg
301 Smithfield Street
Pittsburgh, PA 15222-2277
(412) 232-0334

Counsel for Petitioner

APPENDIX

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MARIO LUDMER,	CIVIL DIVISION
Plaintiff,	No. GD84-11881
vs.	Issue Number:
MAURICE A. NERNBERG, JR.,	Code: 009
Defendant.	CIVIL ACTION

Filed on behalf of Plaintiff, MARIO LUDMER

Counsel on Record on behalf of this Party:
Seymour A. Sikov, Esquire
Pa. I.D. #01002
Sikov and Love, P.A.
Firm #015
1400 Lawyers Building
Pittsburgh, PA 15219
(412) 261-4202

To the within Plaintiff
You are hereby notified to plead to the enclosed within twenty (20) days for service hereof or a default judgment may be entered against you.
SIKOV AND LOVE, P.A.
By: /s/ Seymour A. Sikov
Attorney for Defendant

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by the attorney filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU SHOULD NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

LAWYER REFERRAL SERVICE
(NAME) ALLEGHENY COUNTY BAR ASSOCIATION
920 CITY-COUNTY BUILDING
(ADDRESS) PITTSBURGH, PA 15219

(TELEPHONE) (412) 261-0518

SIKOV & LOVE

BY /s/Seymour A. Sikov

COMPLAINT - CIVIL ACTION

Count I

1. The plaintiff is a medical doctor duly authorized and licensed to practice medicine within the Commonwealth of Pennsylvania maintaining his offices in the Passavant Professional Building located in the City of Pittsburgh, County of Allegheny and Commonwealth of Pennsylvania (hereinafter referred to as Ludmer).

2. The defendant is an adult individual and is an attorney admitted to practice before Courts of the Commonwealth of Pennsylvania and maintaining offices at 301 Smithfield Street in the City of Pittsburgh, County of Allegheny and Commonwealth of Pennsylvania (hereinafter referred to as Nernberg).

3. At all times material hereto, the defendant was acting by and through his duly authorized agents, servants and/or employees who were acting within the scope of their authority and in the course of their employment.

4. On or about March 5, 1979, the defendant, an attorney, commenced a lawsuit against the plaintiff by filing a Praecipe for Writ of Summons in Trespass in the Court of Common Pleas of Allegheny County, Pennsylvania, at G.D. 79-6085, the pleadings, depositions, briefs, court orders and opinions therein being incorporated by reference as if more fully set forth as length herein.

5. On or about July 12, 1979, after

the depositions of the plaintiff, the defendant and one Margaret O'Toole had been taken, the defendant filed a Complaint in Assumpsit in the aforementioned action at G.D. 79-6085, a copy of said Complaint being attached hereto and marked as Exhibit "1".

6. Count I of the aforementioned Complaint filed as G.D. 79-6085 alleged, inter-alia, that Ludmer failed to cooperate with Nernberg in the preparation of a lawsuit in which Nernberg represented one Margaret O'Toole and, as alleged result thereof, the case was settled for less than it was worth and the size of Nernberg's contingent fee consequently reduced.

7. Count II of the aforementioned Complaint filed at G.D. 79-6085 alleged that Ludmer interfered with the contractual relationship which existed between Nernberg and his client, O'Toole.

8. After discovery was taken in the aforementioned matter as G.D. 79-6085, Ludmer filed a Motion for Summary Judgment, a copy of which is attached hereto and marked as Exhibit "2".

9. On or about April 20, 1981, after submission of briefs on Ludmer's Motion for Summary Judgment in the aforementioned matter at No. G.D. 79-6085 and after argument before the Court en Banc, Judges Raymond L. Scheib and Richard G. Zeleznik of the Court of Common Pleas of Allegheny County presiding, the Court granted Ludmer's Motion for Summary Judgment.

10. On or about June 5, 1981, Nernberg appealed the granting of Summary Judgment in the aforementioned matter at G.D. 79-6085 to the Superior Court,

docketed at No. 632 Pittsburgh, 1981, copies of all pleadings, briefs, opinions and orders therein being incorporated by reference as if more fully set forth herein.

11. Thereafter, briefs were submitted by both parties and argument before the Superior Court was held on October 12, 1982.

12. On or about May 6, 1983, the Superior Court issued an Opinion and Order affirming the granting of Ludmer's Motion for Summary Judgment in the lower Court, a copy of the Order and Opinion of the Superior Court being attached hereto, marked as Exhibit "3".

13. From the Opinion and Order entered by the Superior Court in the aforementioned matter at No. 632 Pittsburgh, 1981, Nernberg sought allocatur to the Supreme Court of the Commonwealth of Pennsylvania by filing a Petition for Allowance of Appeal on June 3, 1983.

14. On or about September 14, 1983, the Supreme Court denied the Petition for Allocatur filed by Nernberg, a copy of the letter of the Supreme Court Prothonotary documenting said denial, being attached hereto and marked as Exhibit "4".

15. As a result of the Supreme Court's denial of allocatur of September 14, 1983, the aforementioned action filed by Nernberg against Ludmer was terminated in favor of Ludmer.

16. As a result of the actions of Nernberg in bringing and prosecuting the aforementioned action against Ludmer, Ludmer sustained certain damages and injuries and suffered emotional distress.

17. All of the resultant losses, damages, and injuries sustained by the plaintiff were a direct and proximate result of the gross negligence and outrageous and improper conduct of the defendant in wrongfully and maliciously using civil proceedings against the plaintiff generally and in the following particulars:

a. By commencing and prosecuting the aforementioned action at No. G.D. 79-6085 in a grossly negligent manner and without probable cause; and/or

b. By commencing and prosecuting the aforementioned matter at G.D. 79-6085 primarily for a purpose other than that of securing the proper discovery, joinder of parties and adjudication of that matter; and/or

c. By commencing and prosecution the aforementioned matter at G.D. 79-6085 solely for the purposes of harassing the plaintiff herein; and/or

d. By commencing and prosecuting the aforementioned action at G.D. 79-6085 solely for the purposes of defaming the plaintiff herein; and/or

e. By commencing and prosecuting the aforementioned action at G.D. 79-6085 solely for the

reasons of causing the plaintiff herein undue burden, hardship and expense; and/or

f. By commencing and prosecuting the aforementioned action at G.D. 79-6085 solely for the purposes of maliciously injuring the plaintiff herein; and/or

g. By commencing and prosecuting the aforementioned action at G.D. 79-6085 without properly believing that under the facts set forth therein, the claim would be valid under the existing or developing law; and/or

h. By commencing and prosecuting the aforementioned action at G.D. 79-6085 without properly believing the claim to be valid under the existing law after full disclosure of all relevant facts within his knowledge and information; and/or

i. By commencing and prosecuting the aforementioned action at G.D. 79-6085, as an attorney of record, when he knew that the procurement, initiation or continuation of the matter was intended merely to harass or maliciously injure the plaintiff herein; and/or

j. By commencing and prosecuting the aforementioned action at

G.D. 79-6085 in a grossly negligent manner and without probable cause; and/or

k. By otherwise acting negligently and without due care and regard for the rights and person of the plaintiff.

18. As a direct and proximate result of the gross negligence and outrageous and improper conduct of the defendant, the plaintiff suffered damages to his reputation.

19. As a direct and proximate result of the grossly negligent and outrageous and improper conduct of the defendant, the plaintiff incurred expenses in the nature of court costs and counsel fees in defending himself against the claims set forth in the aforementioned action commenced at No. G.D. 79-6085.

20. As a direct and proximate result of the grossly negligent and outrageous and improper conduct of the defendant, the plaintiff suffered pecuniary loss by being absent from his medical practice in order to meet with his attorney, appear for depositions and otherwise prepare the aforementioned action commenced at No. G.D. 79-6085 for argument and disposition.

21. As a direct and proximate result of the grossly negligent and outrageous, and improper conduct of the defendant, the plaintiff suffered emotional distress caused by the commencement of the action by Nernberg against him and by the necessity of defending himself in the proceedings commenced No. G.D. 79-6085.

22. As a direct and proximate result

of the grossly negligent and outrageous and improper conduct of the defendant, the plaintiff was greatly inconvenienced.

WHEREFORE, the Plaintiff claims of the defendant damages in excess of TWENTY THOUSAND ($20,000) DOLLARS.

COUNT II

23. The allegations set forth in paragraph one (1) through twenty-two (22) inclusive are incorporated by reference as if more fully set forth at length herein.

24. The actions of the defendant in commencing and prosecuting the aforementioned action at No. G.D. 79-6085 were unreasonable, outrageous, grossly careless and in capricious disregard of the rights of the plaintiff inasmuch as the defendant, an attorney, knew or should have known that probable cause for commencement and prosecution of said action did not exist and, as a consequence thereof, damages to the plaintiff herein were substantially certain to follow.

WHEREFORE, the plaintiff requests punitive damages against the defendant in an amount in excess of TWENTY THOUSAND ($20,000) DOLLARS.

Respectfully submitted,

SIKOV AND LOVE, P.A.

By /s/Seymour A. Sikov
Seymour A. Sikov

JURY TRIAL DEMANDED

OFFICIAL DOCKET ENTRIES

COMMONWEALTH OF PENNSYLVANIA }
}SS.
ALLEGHENY COUNTY }

Among the Records and Proceedings of the Court of Common Pleas in and for the County of Allegheny, and State of Pennsylvania, the following is a true and correct copy of the Docket Entries at No. GD 79-6085

DOCKET ENTRY

MAURICE A. NERNBERG, JR.	March 9, 1979 Summons in Trespass
VS.	Returnable April 8, 1979
MARIO LUDMER, M.D.	March 22, 1979 Praecipe for rule to file a complaint filed. March 27, 1979 Writ returned served deft. 3-22-79 filed March 28, 1979 Rule returned acceptance of service 3-28-79 filed April 16, 1979 Verification of M.A. Nernberg filed. May 4,

] 1979 Order of
] April 30, 1979
] permitting
] deposition of
] deft. to be
] limited to
] allegations of
] paragraph 2 of
] pltf's motion.
] pltf to file
] complaint
] within 10 days
] of deft.

I, JOHN P. JOYCE, Prothonotary of the Court of Common Pleas in and for said County, Certify that the foregoing is a full and correct copy of the Docket Entries wherein

MAURICE A. NERNBERG, JR., Plaintiff

and

MARIO LUDMER, M.D. Defendant; as the remains of the record before the said Court, at No. GD 79-6085

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court, the 1st day of July 1981

/s/ John P. Joyce
Prothonotary

/s/ Anna Bodnar
Deputy

deposition-Wettick, J. Eodie opinion filed. May 7, 1979 Notice of deposition of deft. & certificate of mailing 5-4-79 filed. May 10, 1979 Notice to take deposition of pltf. filed. May 14, 1979, Order of May 11, 1979 for taking of depositions of deft. and pltf. as indicated - Wettick, J. June 7, 1979 Response to request filed. June 27, 1979 notice to take deposition files July 12, 1979 Complaint filed July 2, 1979 on June 29, 1979 Plaintiff shall bring with him the documents to said deposition but may raise attorney/client privilege at said deposition-Wettick, J. July 26, 1979 Deft's Preliminary Objections filed. Sept. 16, 1980 Order; Prelim. Objects. of deft. are dismissed, deft, has 20 days to file responsive pleadings- Zappala, J. Sept. 16, 1980 Notice of deposition of S. Sikov filed Sept. 19, 1980 Order of 9-17-80; Motion for extension denied - Papadakos, J. Sept. 22, 1980 Deft's answer & new matter to complaint filed. Sept. 29, 1980 Pltf. & Deft's Cert of Readiness filed (2) Oct. 3, 1980 Notice of deposition of Mario Ludmer, M.D. filed eodie Plff's answer to new matter filed Oct. 3, 1980 Order; Interrogs to be furnished Mr. Rika in leave of any depositions, see Order filed-Wettick, J. Oct. 9, 1980 Cert. of Service of interrogs. 10-9-80 filed. Oct 17, 1980 Ordered that the taking of the second deposition of the defendant in within captioned matter shall be rescheduled for Nov.,1980.- Wettick, J. eodie Countermotion for Sanctions filed Nov. 7, 1980- Deft's Notice of Deposition filed. Nov. 12, 1980 Issue # 113713 Nov. 12, 1980

Interrogs of pltf to S. Sikov & answers filed. December 12, 1980 Motion of deft for stay of proceedings filed eodie deft's motion for summary judgment filed eodie deft's Brief in support of motion for summary judgment filed. Dec.15, 1980 Order of 12-12-80 filed; Dr. Ludmer to appear for deposition on 12-23-80 - Wettick, J. Dec. 16, 1980 Depositions of Maurice A. Nernberg, Jr., Margaret O'Toole & Mario Ludmer, M.D. (3) filed. Jan. 22, 1981 Notice of hearing of Motion to Stay filed. Feb. 17, 1981 Answers to Deposition Questions filed on Behalf of Defts. and Affidavit filed. Feb.18, 1981 Order of 2-11-81 filed; Deft. shall within 5 days/of receipt of this order file full answers by affidavit to question specified - Wettick, J. April 20, 1981 Order; Deft's Motion for Summary Judgment is granted-Scheib, J. May 29, 1981 Judg. entered in favor of deft. as per court order, Notice mailed 5-29-81. June 5, 1981 Notice of appeal of Pltff., Maurice A. Nernberg, Jr. to Superior Court # _____ & proof of service filed.

95-1448

(3)

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MARIO LUDMER,

Respondent,

vs.

MAURICE A. NERNBERG, JR.,

Petitioner.

BRIEF OF RESPONDENT, MARIO LUDMER, IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Seymour A. Sikov, Esquire
SIKOV AND LOVE, P.A.
1400 Lawyers Building
Pittsburgh PA 15219
(412) 261-4202
Counsel of Record for
Respondent

23 pp

QUESTIONS PRESENTED FOR REVIEW

I. IS THERE ANY MERIT WHATSOEVER TO PETITIONER'S CLAIM THAT THERE WAS A RETROACTIVE APPLICATION OF THE WRONGFUL USE OF CIVIL PROCEEDINGS ACT?

II. IF THERE IS ANY MERIT WHATSOEVER TO THE CLAIM OF THE PETITIONER THAT THERE WAS RETROACTIVE APPLICATION OF THE WRONGFUL USE OF CIVIL PROCEEDINGS ACT, DID THE PETITIONER FAIL TO FILE HIS PETITION FOR WRIT OF CERTIORARI WITHIN THE APPROPRIATE TIME LIMITATIONS PERMITTING THE FILING OF SAID PETITIONS?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are listed in the caption of the within Brief of Respondent, Mario Ludmer, in Opposition to Petitioner's Petition for Writ of Certiorari.

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STATEMENT OF JURISDICTION

Respondent does not believe that this Honorable Court has jurisdiction in this matter because of the applicable provisions of 28 U.S.C.A. §2101 and 2104.

STATEMENT OF THE CASE

This matter comes before the Court on the Petition for Writ of Certiorari filed by the Petitioner Maurice A. Nernberg, Jr. (Nernberg), an attorney who is licensed to practice law in the Commonwealth of Pennsylvania and who maintains his offices in the City of Pittsburgh, County of Allegheny and Commonwealth of Pennsylvania.

So that the Court will understand the nature of the entire matter, which has been going on for some sixteen (16) years in the several courts of the Commonwealth of Pennsylvania, a detailed statement of the facts is necessary, especially where the facts stated by the Petitioner beginning on page 5 of his Petition do not correctly set forth what occurred.

One Margaret O'Toole was injured in a vehicular accident which occurred on February 9, 1975 in Allegheny County, Pennsylvania. As a result of those injuries, she was taken by ambulance to the North Hills Passavant Hospital, where she came under the care of Dr. Mario Ludmer, a board certified neurosurgeon, because of injuries to her head and neck regions. During the six (6) days that Mrs. O'Toole remained in the hospital, Dr. Ludmer treated her. Following her discharge from

the hospital, Mrs. O'Toole remained under the care of Dr. Ludmer until on or about March 6, 1975, at which time the office notes of Dr. Ludmer revealed that she was feeling quite good and that it was only necessary for her to return to see him if she had additional problems. Mrs. O'Toole never returned to see Dr. Ludmer after March 6, 1975, some four (4) weeks following the happening of the vehicular accident.

Initial counsel for Mrs. O'Toole in the vehicular accident claim, one Paul E. Moses, Esquire, requested a report from Dr. Ludmer using a form which the attorney supplied; Dr. Ludmer completed this form based upon his records and based upon his examinations and evaluations of Mrs. O'Toole, and he forwarded same to the initial attorney.

Subsequently, this sometime in 1977, an exact date not known as the Power of Attorney forming part of Attorney Nernberg's file was not dated, Mrs. O'Toole retained Nernberg to represent her in a claim for damages for personal injuries allegedly sustained in the aforementioned vehicular accident. Nonetheless, in September of 1977, at the request of Nernberg, a conference was held between Dr. Ludmer and Nernberg at Dr. Ludmer's offices, Mrs. O'Toole being present. At that time, based upon the testimony of Dr. Ludmer during

the trial in his claim against Nernberg, it was revealed that Attorney Nernberg wanted Dr. Ludmer to "send a new report" stating that Mrs. O'Toole would have had residual difficulties as a result of injuries sustained in the accident. Dr. Ludmer refused to send such a report as his records were not consistent with that statement. (It is to be noted that Nernberg, in his Petition to this Court, claimed that Dr. Ludmer billed Nernberg for a report, that Nernberg paid the bill, and never received the promised report; this is a fabrication by Nernberg as the testimony reflected that there was no contractual obligation or agreement between Nernberg and Dr. Ludmer calling for a report, and that the sum in the amount of $100.00, which had been paid by Nernberg to Dr. Ludmer, was for the conference in September of 1977 at Dr. Ludmer's offices, and nothing else. (See Respondent's Appendix 1a.)

The claim on behalf of Mrs. O'Toole was scheduled for trial in the Court of Common Pleas of Allegheny County, Pennsylvania, to commence on or about October 9, 1978. Sometime in September of 1978, Dr. Ludmer was served with a subpoena by the offices of Nernberg directing Dr. Ludmer to appear to testify at the time of the trial of Mrs. O'Toole. At that point, Dr. Ludmer contacted present counsel

for Dr. Ludmer, Seymour A. Sikov, Esquire, and requested that Attorney Sikov accompany him to the trial in view of repeated harassing letters and phone calls between September of 1977 and September of 1978 from Nernberg to Dr. Ludmer about Dr. Ludmer's alleged failure to supply Nernberg with "a new report" to include statements which were not true, Dr. Ludmer refusing to so do. Nernberg was advised by Attorney Sikov that Dr. Ludmer was prepared to appear to testify on behalf of Mrs. O'Toole and, in fact, on the day that Dr. Ludmer was scheduled to appear, he appeared on the 7th Floor of the Court of Common Pleas of Allegheny County, Pennsylvania, at the courtroom of Judge S. Louis Farino, this at or about 1:15 p.m. on October 10, 1978; at that time, Dr. Ludmer was advised by Court personnel that the claim of Mrs. O'Toole had been settled amicably by she and her attorneys that morning. (It is to be noted that on page 6 and page 7 of Nernberg's Petition he has made misrepresentations regarding the willingness of Dr. Ludmer to appear to testify, these being untrue statements and were testified to as being untrue by Dr. Ludmer in the claim of Mario Ludmer vs. Maurice A. Nernberg, Jr. at GD No. 79-6085 in the offices of the Prothonotary of Allegheny County, Pennsylvania. Further, there has never been any testimony permitted in the trial Court

as to any evaluation of the claims of Mrs. O'Toole arising as a result of the vehicular accident of February 9, 1975, and the figures set forth on page 7 of Nernberg's Petition are, once again, misrepresentations of the facts. Perhaps, Nernberg and Mrs. O'Toole "would have liked" to receive a settlement or verdict of $20,000.00, but no one has ever testified or agreed that said sum was the value of Mrs. O'Toole's claim. It was settled for $8,000.00 at the time of trial.

On March 5, 1979, Nernberg initiated an action against Dr. Ludmer by the filing of a Writ of Summons in Trespass in the offices of the Prothonotary of Allegheny County, Pennsylvania, serving same upon Dr. Ludmer. (See Respondent's Appendix 2a). At that time, Dr. Ludmer again retained present counsel of record to represent him in defense of the claim.

Eventually, this on July 2, 1979, the deposition of Dr. Ludmer was taken by Attorney Nernberg representing himself, present counsel for Dr. Ludmer taking the depositions of Nernberg and Mrs. O'Toole. It is to be noted that Mrs. O'Toole testified during that deposition as follows:

> 1) That she did not know of the filing of the underlying action by the Defendant against the Plaintiff at the time it was filed or until some three or four months later;

2) That had she been consulted concerning same, she would not have joined as a party Plaintiff;

3) That she did not desire to be part of any such action;

4) That she did not consent to the filing of the action;

5) That she had no claim against Dr. Ludmer; and

6) That she was never asked by Nernberg to be a party to his action.

Subsequent to the taking of the aforementioned depositions, this on July 12, 1979, Nernberg filed a "Complaint in Assumpsit" (See Respondent's Appendix 3a) against Dr. Ludmer demanding, inter alia, damages in the amount of $3,400.00 from Dr. Ludmer for alleged breach of contract and alleged intentional interference by Dr. Ludmer with Nernberg's relationship with Mrs. O'Toole. (The Court's attention is invited to the fact that "where the figure of $3,400.00 came from" was never brought out in any testimony whatsoever; Attorney Nernberg testified that Mrs. O'Toole's case settled for $8,000.00 and that he reduced his contingent fee to $1,400.00 to settle the claim. See Respondent's Appendix 4a).

After the pleadings were complete, and based upon the deposition testimony and based upon the case law of the

Commonwealth of Pennsylvania, Ludmer moved for a summary judgment in his favor in the claim brought against him by Nernberg, which judgment was granted in the lower court and affirmed in the Superior Court of Pennsylvania, the Supreme Court of Pennsylvania denying allocatur on September 14, 1983.

On July 9, 1984, because Dr. Ludmer had been put to considerable expense and had suffered considerable emotional distress because of the allegations brought against him by Nernberg and because Nernberg persisted in filing two appeals to the appellate courts from the granting of Dr. Ludmer's Motion for Summary Judgment in Nernberg's lawsuit against him, Dr. Ludmer brought an action against Nernberg pursuant to the Wrongful Use of Civil Proceedings statute of the Commonwealth of Pennsylvania. This action was filed at No. G.D. 84-11881 in the office of the Prothonotary of Allegheny County, Pittsburgh, Pennsylvania. Preliminary Objections to the Complaint were filed by Attorney Nernberg, the Court of Common Pleas of Allegheny County, Pennsylvania, the Honorable Bernard J. McGowan presiding, sustaining the Preliminary Objections. The Superior Court of Pennsylvania, in a Memorandum Opinion, reversed the Order of the Court of Common Pleas of Allegheny County and remanded the matter

for further proceeding. This Court found that, based upon the provisions of the Wrongful Use of Civil Proceedings statute, Dr. Ludmer had properly averred an appropriate action. With regard to the issue which Nernberg appears to be raising with this Court, namely, that there was retroactive application of the Wrongful Use of Civil Proceedings Act, the Superior Court found that the Act of 1980 contemplated and covered not only the "initiation" of civil process against someone, but also the wrongful "continuation" thereof as grounds for the application of said Act.

Attorney Nernberg then filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, which Petition was granted, the Supreme Court, by Opinion dated February 3, 1989, affirming the decision of the Superior Court of Pennsylvania holding that, because Nernberg continued to prosecute his action against Dr. Ludmer after the effective date of the 1980 Act, the cause of action "did not accrue" until all the requirements of the Act had been met which included obtaining of a favorable outcome, which finally occurred on February 3, 1989, and, therefore, Nernberg was subject to an action for wrongful use of civil proceedings. (The Court's attention is invited to the Opinion of the Honorable Justice Stephen Zappala set forth on pages 24a through 48a

of Petitioner's Petition. Rather than reiterate to this Court the logic used by the Supreme Court of Pennsylvania, I invite this Court's attention to pages 28a through 35a wherein the Supreme Court of Pennsylvania specifically deals with the questions now being presented for review to this Court by Petitioner.)

It is to be noted that, although Attorney Nernberg filed the lawsuit against Dr. Ludmer in 1979, his appeal to the Superior Court of Pennsylvania was filed on June 5, 1981, this after the effective date of the Wrongful Use of Civil Proceedings Act, and his Petition for Allowance of Appeal to the Supreme Court was filed in May of 1983. Attorney Nernberg was well aware of the provisions of the Wrongful Use of Civil Proceedings Act, which became effective on February 19, 1981, at the time he filed each of these appeals; accordingly, he should not now be heard to claim that the provisions of the Act were retroactive.

In November of 1992, the claim of Dr. Ludmer finally came to trial before the Honorable Gerard M. Bigley, Judge of the Court of Common Pleas of Allegheny County, the jury, after two (2) weeks of trial, and after the presentation of substantial evidence, this to include testimony by expert witnesses presented by both Dr. Ludmer and

Attorney Nernberg, found in favor of Dr. Ludmer and against Nernberg in the amount of $25,000.00 of compensatory damages and $50,000.00 punitive damages.

As is apparent from Petitioner's Petition, once again, Nernberg filed appeals from the jury verdicts, the Superior Court of Pennsylvania affirming the denial of Nernberg's Motion for Post Trial Relief, the Supreme Court of Pennsylvania denying Nernberg's Petition for Allowance of Appeal. Although Nernberg filed a Petition for Reconsideration of the Denial of Allowance of Appeal, the Supreme Court of Pennsylvania on October 24, 1995 denied the Petition for Reconsideration.

It was not until November of 1995 that payment of the verdict, plus interest, was finally made by the surety company from which Nernberg had purchased an appeal bond. After the Supreme Court of Pennsylvania denied Nernberg's Petition for Allowance of Appeal on July 21, 1995, action was taken pursuant to the Rules of the Court of Common Pleas of Allegheny County, Pennsylvania, to obtain payment of the verdict plus interest from the surety. Nernberg filed an appeal from an Order of Court dated October 31, 1995, the Honorable Judge Bigley presiding, he being the original Trial Judge, directing the bonding

company to forthwith pay the verdict plus interest and costs to Dr. Ludmer, which payment has been made and the sums have been distributed to the parties entitled to same.

It is to be noted that Nernberg again filed papers in the nature of an Emergency Application for Special Relief, this with the lower court, as well as with the Supreme Court of Pennsylvania. Both courts denied the Motion, the Supreme Court remanding the record back to the Trial Judge, Judge Bigley, who was to hold a hearing on the assessment of legal fees and expenses against Nernberg and in favor of Seymour A. Sikov, Esquire, because of the frivolous and vexatious conduct of Nernberg in continuing to file frivolous papers to include an Emergency Application for Special Relief.

On page 10 of his Petition, Nernberg makes two (2) mis-statements, as follows:

1) That he did not have notice of the hearing before Judge Bigley before whom an appropriate Order of Court was sought, this pursuant to local rules, to order the surety to pay Dr. Ludmer his verdict, interest and costs -- notice in writing was given to Nernberg the day before the hearing was held, and he chose not to attend;

2) That there was no hearing on the imposition of costs -- Nernberg wrote counsel for Dr. Ludmer on December 7, 1995 (See respondent's Appendix 5a) advising that there was no

necessity for holding a hearing which had been ordered by the Supreme Court of Pennsylvania by Amended Order dated December 4, 1995 before Judge Bigley, Nernberg paying counsel fees and expenses to the undersigned as Attorney for Dr. Ludmer pursuant to the appropriate laws of the Commonwealth of Pennsylvania. (See Respondent's Appendix 6a).

ARGUMENT

I. THERE WAS NO RETROACTIVE APPLICATION OF THE WRONGFUL USE OF CIVIL PROCEEDINGS ACT.

The provisions of the Wrongful Use of Civil Proceedings Act, with particular reference to 42 Pa. C.S.A. §8351, as reiterated in other portions of the Act, set forth the following:

> (a) **Elements of action**. -- A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings:

The Act specifically provides not only a cause of action against a person who "initiates" civil proceedings wrongfully, but also against a person who "continues" said civil proceedings wrongfully. As was specifically set forth by the Supreme Court of Pennsylvania in its decision dated February 3, 1989, same forming part of Petitioner's Petition beginning on page 26a and, therefore, not repeated herein, the Court found that the initiation of a lawsuit is only one element of the cause of action, finding that Dr. Ludmer's cause of action did not accrue until such time as he successfully defeated the Petitioner herein in his attempts to have Ludmer held legally liable; this did not finally occur until the Supreme Court of Pennsylvania denied Nernberg's Petition for

Allowance of Appeal in his claim against Ludmer on September 14, 1983. Each separate action of Nernberg, in essence, constituted the initiation and/or continuation of the civil proceedings against Dr. Ludmer, namely the filing of the appeal to the Superior Court of Pennsylvania following the effective date of the Act, as well as filing a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania some two years following the effective date of the Act. Whether this Court finds that these are separate actions which could constitute "the initiation of civil proceedings", or finds, as the Superior Court and Supreme Court of Pennsylvania found, that these actions constituted a "continuation" of the civil proceedings against the Respondent herein, or finds that Dr. Ludmer's cause of action against Nernberg did not accrue until the underlying case was finally terminated on September 14, 1983, in any event same were not retroactive applications of the Act as claimed by the Petitioner herein.

Counsel for the Respondent has reviewed the decisions of this Court allegedly in support of Petitioner's Petition; a review of said decisions does not reflect that either the factual situation nor the holdings by this Court is applicable to the within factual situation.

As indicated in the lengthy Statement of Facts incorporated herein, this Court must find that there was no retroactive application of a statute of the Commonwealth of Pennsylvania and, accordingly, should dismiss or deny Petitioner's Petition.

II. THE PETITIONER FAILED TO FILE HIS PETITION FOR WRIT OF CERTIORARI WITHIN THE APPROPRIATE TIME LIMITATIONS PERMITTING SAID PETITION.

If this Court finds any merit whatsoever in the position taken by Petitioner, it must also find that the Petitioner failed to file his Petition for Writ of Certiorari to this Court within the applicable time limitations.

The provisions of 28 U.S.C.S. §2101 and §2104 set forth that any appeal or any Writ or Certiorari to review the judgment of a state court must be filed within ninety (90) days after the entry of such judgment or decree. The decree permitting the action of Dr. Ludmer to proceed against Nernberg pursuant to the provisions of the Wrongful Use of Civil Proceedings Act was entered on February 3, 1989. (See page 26a of Petitioner's Petition). Accordingly, as the action to proceed by Dr. Ludmer against Mr. Nernberg was allowed by the Supreme Court of Pennsylvania on that date, the ninety (90) day period began to run on that date. It is apparent that the present Petition was not filed within ninety (90) days from that date.

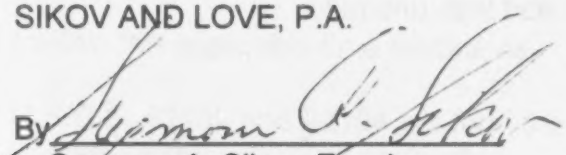
In the event that this Court finds a later date to be applicable, the latest date that could be applicable would be the date that the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal filed by Petitioner herein from the Judgment entered against him in the action filed by Dr. Ludmer against Nernberg at No. GD79-6085 in the Court of Common Pleas of Allegheny County, Pennsylvania, that decision denying allocatur having been entered on July 21, 1995. Once again, the Petition herein was filed more than ninety (90) days from that date and was untimely.

CONCLUSION

In conclusion, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari by Petitioner on his own behalf granting, as did the Supreme Court of Pennsylvania in its Order of December 4, 1995, the right of Respondent herein to apply for reasonable counsel fees to the trial court pursuant to the applicable laws of the Commonwealth of Pennsylvania.

Respectfully submitted,

SIKOV AND LOVE, P.A.

By 
Seymour A. Sikov, Esquire
Attorney for Respondent

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